Supreme Court, U.S.
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No. 09-930

IN THE

Supreme Court of the United States

KENYON B. FITZGERALD JR., PETER SCOVILLE WELLS, SIDNEY SILLER, DISABLED AMERICAN VETERANS DEPARTMENT OF NEW YORK,

Petitioners,

—against—

WADE F.B. THOMPSON, ELIHU ROSE, ARIE L. KOPELMAN, STEPHEN LASH, EDWARD KLEIN, REBECCA ROBERTSON, KIRSTEN REOCH, CHARLES GARGANO, WILLIAM SHERMAN, CAROL BERENS, JOHN DOE, MARY ROE, SEVENTH REGIMENT ARMORY CONSERVANCY, INC.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Do Veterans of the Armed Forces have Article III standing to challenge the unconstitutional taking and transfer of historic military sites?

2. Do the Petitioning individual military Veterans have a continuing right of access to the Seventh Regiment Armory in New York City for military, educational and recreational purposes, unconstitutionally deprived by state action? (Fifth and Fourteenth Amendments)

3. Do these military Veterans have a right to offer museum programs and exhibits in the National Historic Landmark armory's public spaces to educate visitors about the role of citizen-soldiers in America's wars, and has that right been violated by the state action converting those spaces into commercial restaurants? (First, Fifth and Fourteenth Amendments)

4. Do the Disabled American Veterans and other veterans' association Petitioners have a statutory right of free access to the Armory's "Veterans Room" and other historic regimental rooms for meetings and social events which has been unconstitutionally deprived by state transfer to a favored private party for commercial use? (NYS Military Law Section 183, and First, Fifth and Fourteenth Amendments)

LIST OF PARTIES

Plaintiff KENYON B. FITZGERALD, JR., is Chair of the 107th Infantry Regiment (Seventh New York) Historical Society, chartered by the Regents of the State of New York in 1964 to operate a military history museum pertaining to the Seventh Regiment New York National Guard. He served in the armed forces of the United States from June 1960 to June, 1966. He brings this action individually and as representative of the Historical Society and also as class representative of all military personnel who served in the Seventh Regiment, the 107th Infantry Regiment, and successor organizations.

Plaintiff PETER SCOVILLE WELLS is Treasurer of the 107th Infantry Regiment (Seventh New York) Historical Society. He served in the Armed Forces of the United States from 1958 to 1964, first in the 525 M. I. Group and then in the Seventh Regiment, 107th Battle Group. Mr. Wells' father and uncle also both served in the Seventh Regiment of the New York National Guard, based at the Armory. He brings this action individually and as representative, along with Mr. Fitzgerald, of the Historical Society, and as a class representative of all military personnel who have served in the Seventh Regiment, the 107th Infantry Regiment, and successor organizations.

Plaintiff SIDNEY SILLER is Department Adjutant for the Disabled American Veterans, Department of New York, Inc.; and a disabled veteran of World War II and the U.S. military force in Korea in 1945 and 1946.

Plaintiff DISABLED AMERICAN VETERANS DEPARTMENT OF NEW YORK, INC. is one of the veterans organizations expressly granted, under Sec-

tion 183 of the Military Law of New York State, the use of armories in New York State for regular and special meetings and organization social events of a private nature without payment of any charge or expense therefor. It brings this action on its own behalf and, along with Sidney Siller, as class representative for all members statewide of all other veterans' organizations granted similar rights under such law, including posts or chapters of

The United Spanish War Veterans

The American Legion

The Veterans of Foreign Wars of the United States

The Disabled American Veterans

The AMVETS

American Veterans of World War II

The Jewish War Veterans of the United States, Inc.

The Catholic War Veterans, Inc.

The Italian American War Veterans of the United States, Incorporated

The Polish Legion of American Veterans, Inc.

The Army and Navy Union of the United States of America

Posts of the Masonic War Veterans of the state of New York, Incorporated

Groups of squadrons of New York Wing

Groups of squadrons of New York Civil Air Patrol

Groups of incorporated associations of veterans of units of the organized militia

Organizations of sons of veterans of any war of the United States

Organizations of the Reserve Officers Association of the United States

Organizations of historic military commands set forth in section two hundred forty-a of the NYS Military Law

Defendants WADE F. B. THOMPSON, ELIHU ROSE, STEPHEN LASH, ARIE L. KOPELMAN, EDWARD KLEIN, REBECCA ROBERTSON, and KIRSTEN REOCH are sued herein in their individual capacities and as directors, officers and employees of defendant Seventh Regiment Armory Conservancy, Inc.

Defendant CHARLES GARGANO was Chair of the Empire State Development Corporation, and defendants WILLIAM SHERMAN and CAROL BERENS were Project Managers of ESDC at the times of the wrongful actions described below. Defendants GARGANO, SHERMAN and BERENS are sued herein in their individual and representative capacities.

Defendant SEVENTH REGIMENT ARMORY CONSERVANCY, INC. ("the Conservancy") is the purported Lessee of the Armory from the State of New York acting through the Empire State Development Corporation ("ESDC"). The Conservancy is a not-for-profit corporation organized under the laws of the State of New York (using a deceptive name that falsely suggests some official connection with the Seventh Regiment).

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Supreme Court Rules, counsel for Petitioners certify that Disabled American Veterans, Department of New York, Inc. is a 501(c)4 non-profit New York State membership corporation. Its corporate parent is Disabled Veterans, chartered by Congress. It is affiliated with Disabled American Veterans of New York Services, Inc., a 501(c)3 non-profit corporation.

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CITATIONS OF OFFICIAL AND UNOFFICIAL REPORTS OF OPINIONS AND ORDERS ENTERED IN THE CASE

The Decision and Judgment of the District Court dismissing Petitioner's Complaint in its entirety, filed on January 5, 2009, is reported unofficially at 2009 WL 29599 (S.D.N.Y) and is reproduced in the Appendix at page 7a.

The Order of the U.S. Court of Appeals for the Second Circuit, affirming the District Court, filed on November 16, 2009, is reported unofficially at 2009 WL 3806414(C.A.2(N.Y.)) and is reproduced in the Appendix at page 1a.

BASIS FOR JURISDICTION IN THE SUPREME COURT

The order of the Court of Appeals sought to be reviewed was entered on November 16, 2009. This Petition for Certiorari is being filed within 90 days thereof.

The statutory provisions believed to confer on this Court jurisdiction to review on a writ of certiorari the order in question are 28 U.S.C. Sections 1254(1) and 2101.

Certiorari is appropriate under Supreme Court Rule 10(c) because a United States Court of Appeals has decided an important question of federal law that has not been, but should be, settled by this Court, and in a way that conflicts with relevant decisions of this Court.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED IN THE CASE

Article III; Article VI; Amendment I; Amendment V; and Amendment XIV, Section 1 (All in pertinent part)

Article III

Section 1. The judicial power of the United States, shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish. * * *

Section 2. The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, * * * .

Article VI

* * * This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding * * *

Amendment I

Congress shall make no law * * * abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

Amendment V

No person shall * * * be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment XIV, Section 1

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

New York State Military Law § 183 (in pertinent part)

Paragraphs (a) and (b) of New York State Military Law § 183

§ 183. Use of armories. 1. Armories may be used as follows:

(a.) By members and units of the organized militia and cadet corps of such units.

(b.) On application of one or more posts or chapters of the United Spanish War Veterans, the American Legion, the Veterans of Foreign Wars of the United States, the Disabled American Veterans, the AMVETS, American Veterans of World War II, the Jewish War Veterans of the United States, Inc., The Catholic War Veterans,

> Inc., the Italian American War Veterans of the United States, Incorporated, the Polish Legion of American Veterans, Inc., the Army and Navy Union of the United States of America, posts of the Masonic War Veterans of the state of New York, Incorporated or groups of squadrons of New York Wing, Civil Air Patrol, or of incorporated associations of veterans of units of the organized militia, or one or more posts or chapters of organizations of sons of veterans of any war of the United States or of the Reserve Officers Association of the United States, or those historic military commands set forth in section two hundred forty-a of the [NYS Military Law] . . . . approved by the officer in charge and control of the armory, and by his military superiors as prescribed by regulations issued pursuant to this chapter and under such restrictions as may be prescribed by the adjutant general, the officer in charge and control of an armory shall provide a proper and convenient room or rooms or other appropriate space in such armory where such posts or chapters may hold regular and special meetings and organizational social events of a private nature without the payment of any charge of expense therefore, provided that such use does not interfere with the members and units of the organized militia stationed in such armory.

Chapter 482, 2004 Laws of New York State

Chapter 482, 2004 Laws of New York State is reproduced in the Appendix at pages 26a to 36a.

STATEMENT OF THE CASE

The Seventh Regiment Armory in New York City is unique. It was built in the nineteenth century with private funds raised and contributed by volunteer members of the Regiment and placed in the ownership of the Regiment's field officers (Majors and Colonels) as Trustees. It is private property for purposes of the Fifth and Fourteenth Amendments and may not be taken by the state without due process of law and just compensation.

This case challenges the action of the New York Legislature in adopting a statute drafted by a private law firm to benefit one of its clients, passed in the closing hours of the 2004 session. The statute took ownership and control of the Armory away from the Regiment's Trustees and transferred it to the Empire State Development Corporation, which in turn leased it for 99 years to the private client for whom the legislation and bidding process was expressly crafted—defendant Seventh Regiment Armory Conservancy, Inc.

The Seventh Regiment Armory is a monument to America's citizen-soldiers as state militias, National Guard, and wartime draftees. The Seventh was the first body of troops to come to the defense of Washington, D.C. (including the U.S. Supreme Court) at the start of the Civil War.

Plaintiffs Kenyon Fitzgerald and Peter Wells are representative of the citizen-soldiers who have served on active military duty in defense of their country and its interests. Mr. Wells served in the Seventh Regiment, as did his father and uncle before him.

The Disabled American Veterans is an organization of citizen-soldiers from America's recent wars who have suffered permanent disabilities while serving their country.

All of these military veterans have joined together as Plaintiffs in this action to preserve the Seventh Regiment Armory as a historic landmark honoring the military service and sacrifice of the nation's citizen-soldiers. They oppose the Conservancy's plan to convert the landmark historic Regimental and Company rooms on the first and second floors of the nineteenth century Administration Building into an elite commercial restaurant, cocktail bar, and banquet and corporate reception facility where, according to one RFP restaurateur, well-heeled patrons will be served "fabulous food." (Complaint, Ex I. Appendix page 37a)

These historic spaces are tied to the service of volunteer citizen-soldiers who have fought for the nation since its founding. Plaintiffs argue that the spaces should be used as a military history museum under the 1964 charter granted by the Regents of the State of New York, and should tell the human story of the men and women who fought—and often laid down their lives—winning this country's independence and defending it against armed invaders[1].

There is no dispute about the desirability of restoring and preserving the Seventh Regiment Armory as a National Historic Landmark. Petitioners welcome long-overdue funding to repair and restore portions of the building that have suffered from age and insufficient funding in the past.

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[1] For one suggested Armory museum design, see website for the "LafayetteFreedomCenter.org".

However, Petitioners strenuously oppose the use of the historic regimental and company rooms of the restored Armory for commercial purposes and the transfer of absolute control over such use to a private organization antagonistic to the traditional military purposes and meaningful interpretation of the U.S. military history associated with this noble and important structure.

The basic question in this case is whether the historic Seventh Regiment Armory, built and paid for by the National Guard in the 1870s, will continue to fulfill its military purposes as an armory primarily as a military history museum telling the public the story of America's citizen-soldiers and as a meeting place for military veterans, or whether it will be converted by a private group of wealthy individuals operating under the umbrella of a tax-exempt private charity into a fashionable Performing Arts Center and Four Seasons-style restaurant complex.

Proceedings Below

The Complaint was filed in the Southern District of New York on July 31, 2007. Defendants filed a motion to dismiss under FRCP 12, which the District Court granted on January 5, 2009. (Appendix, pages 7a-25a)

Plaintiffs took a timely appeal to the Court of Appeals for the Second Circuit, which affirmed the District Court's dismissal of the Complaint by Summary Order on November 16, 2009. (Appendix, pages 1a-6a)

This Petition for Certiorari followed.

STATEMENT OF FACTS

The essential facts on which this case is founded are set forth in paragraphs 12 to 69 of the Complaint. They may be briefly summarized as follows:

The Seventh Regiment Armory was built in the 1870s on land leased to the Regiment by the City of New York to be used "exclusively" for "Armory and Drill Rooms." It was paid for out of private contributions raised by members of the militia regiment.

In 2004, the New York State Legislature passed a bill written by a New York City law firm for a private client, the "Seventh Regiment Armory Conservancy, Inc." The law firm's legislation enabled the turnover of the Armory to the "Conservancy" under a 99-year lease, along with all Armory rental income.

The Development Corporation's lease requires the Conservancy to operate the historic landmark regimental and company rooms in the Administration Building (facing Park Avenue) as commercial restaurant, cocktail lounge, and corporate reception spaces instead of "Armory and Drill Rooms". (Appendix, pages 40a to 43a) The state lease limits the area set aside for "military use" to two small offices on the third floor, inaccessible to the general public and too small for meetings and events of veterans organizations like the DAV.

A detailed recital of the history of the Seventh Regiment Armory and its takeover by the private "Seventh Regiment Armory Conservancy, Inc." is set out in the complaint. The following highlights of those allegations provide the direct factual grounds for the principal issue on this petition: have the Petitioners been deprived of any legal or Constitutional rights in continued use of the property for Armory

purposes which give them standing to bring this action?

The predecessors of the Seventh Regiment were units of all-volunteer state militia, one of which was formed as early as 1806. The Regiment itself came into being as an amalgam of these militia units in 1847. As volunteers, the members of the Regiment paid for their own uniforms and equipment, and eventually for the construction of the Regiment's Armory on land leased by the City to the Regiment's field-grade officers (Major and above). The Regiment had a particularly notable record of service during the Civil War and World War I[2].

In 1992, the Armory and its principal interior spaces were designated New York City landmarks by the NYC Landmarks Preservation Commission. The designation of the interior spaces was an unusual action, based on the Commission's finding that they constituted "historically and architecturally significant spaces."

The building is listed on the New York State and National Registers of Historic Places. In 1993, the Armory was designated a National Historic Landmark.

The Armory consists of two structures: (1) a multistoried building, or administration building (the "Administration Building"), which contains administrative offices, meeting rooms and social areas, and (2) a one-story drill room (the "Drill Hall"), used for military training.

The Administration Building contains important late nineteenth-century period rooms designed and

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[2] See statue honoring the Regiment's World War I service in New York's Central Park at Fifth Avenue and 67th Street.

decorated by leading artists and craftsmen. The Drill Hall, a 200 by 300 foot structure, is said to be the oldest extant "balloon shed" (barrel-vaulted roof supported on exposed trusses or ribs) in America.

In recent times, the Armory's principal military function has been as a center and gathering point for troops and equipment for civil emergencies. It was used as such following the terrorist attacks on September 11, 2001. The Armory has also served as work and meeting space for various Seventh Regiment-related support, social and recreational organizations (including the organizations in which Petitioners Fitzgerald and Wells have had active roles).

In recent years the large Armory Drill Hall has also been a venue for a variety of income-generating public events, including antique shows, art shows, and antiquarian book fairs serving as fundraising vehicles for community charitable organizations. Until 2004, the Regiment was directed to send all rental revenues from such activities to the State's Adjutant General, making them unavailable for repair and upkeep of the building. Now those funds are turned over to the private Conservancy.

The successor units to the Seventh Regiment have unsuccessfully requested the State to provide funds to renovate and maintain the Armory as well as pay for installation of a military history museum in the Armory, chartered in 1964 by the New York State Regents. The State has repeatedly failed and refused to provide such funding. As a result, the Armory's interior and exterior have deteriorated and are in need of repair and replacement. This "blight" is the State's own doing through deliberate withholding of funds.

The Unconstitutional Transfer of Private Property

The private property at the core of this case consists of both the Regiment's leasehold to the land on which the Armory sits, and the Armory itself. Both property interests are to be privately held in trust by the Regiment's field officers as Trustees. These property rights are in perpetuity, so long as the property is used for the Regiment's lawful purposes as an Armory and drill rooms. [See Complaint pars 18, 19, 21-26, and 36-39.]

Petitioners do not dispute the continued use and rental of the Drill Hall for selected low-impact cultural activities such as the traditional art, antiques and antiquarian book shows benefiting local charities, as being lawful purposes in the public interest.

Petitioners, however, strenuously dispute the Conservancy's non-armory use of the historic military meeting spaces on the First and Second floors of the Administration Building—all paid for out of private funds raised or provided by members of the Seventh Regiment—for corporate reception rooms and commercial restaurants. This commercial use is not a proper public purpose; is not a lawful "Armory and Drill Room" use under the City Lease; and violates the legal and Constitutional rights of Armory access of Plaintiffs and all classes of veterans they represent in this proceeding.

The Petitioners' legal contentions on its appeal below were the following:

1. The 2004 State legislation transferring the Seventh Regiment Armory from a trusteeship to a preselected private non-profit organization was an unconstitutional taking under the principle of

"impermissible favoritism" enunciated in *Kelo v. New London.*

2. Limiting the Seventh Regiment to two offices on the top floor of the Armory violated the Trustees' fiduciary duty to use the Armory "exclusively for an Armory and drill rooms."

3. The Conservancy's plan to convert the Armory's landmarked interior spaces into commercial restaurant, cocktail lounge, banquet and corporate reception facilities prevents proper armory use as a military history museum and denies free space for veterans' organizations for meetings and events.

4. The named plaintiffs and class members had legal and Constitutional rights in the Armory prior to the unlawful taking in 2004, which they have vigorously pursued.

JURISDICTIONAL STATEMENT

This action arises under the Constitution and Laws of the United States, including Amendments 1, 5 and 14; and 42 U.S.C. §1983; along with the Federal Courts' equitable and pendent jurisdiction. The District Court had jurisdiction over the federal question claims under 28 U.S.C. §1331; over declaratory judgments under 28 U.S.C. §2201; and over the statutory, common law and equitable claims under the Court's supplemental jurisdiction under 28 U.S.C. §1367. On January 5, 2009, the District Court filed its Opinion and Order dismissing the Complaint in its entirety. On November 16, 2009, the Court of Appeals affirmed the District Court's dismissal in a summary opinion and order. Both opinions are set forth in the Appendix.

WHY CERTIORARI SHOULD BE GRANTED

The Second Circuit Court of Appeals has decided an important question of federal law which should be settled by this Court (Rule 10(c))—whether Veterans of the Armed Services have Article III standing to challenge the unconstitutional taking and transfer of historic military sites.

The Circuit Court's decision conflicts with (1) this Court's recognition of injury-in-fact based on illegal actions involving a specific location (*FOE v. Laidlaw*, 528 U.S. 167 (2000)); (2) this Court's recognition of associational standing to protect the interests of individual members of membership organizations (*Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333 (1997)); and (3) this Court's series of decisions upholding of First Amendment rights of assembly, association and free speech, a number of which are cited below.

These are novel Article III questions in the context of veterans' rights that vitally affect a significant group of the U.S. population who have risked their lives preserving the very liberties they seek to enforce.

The dispute here revolves around an Empire State Development Corporation 99-year lease of the Seventh Regiment Armory in Manhattan to a favored private group for use as a performing and visual arts center combined with a high-end commercial restaurant and cocktail lounge complex, under the authority of state legislation authorizing takeover of the Armory from its Seventh Regiment Trustees.

The entire takeover of the privately-owned property and transfer to a private group was engineered

through a private law firm strategy to give control of the prized property to a client of the firm.

The State Legislature's action did not merely violate property rights of trust beneficiaries, but also deprived the individual and association plaintiffs of important First Amendment rights:

(1) their rights of association and assembly, and

(2) their right of free expression in educating the public about the roles and specifics of the history of their units and of all citizen-soldiers in defending our liberties.

When a state or local government deprives citizens of First Amendment rights, the government must justify the abridgment of freedom by showing a subordinating interest that is compelling.

> [G]overnmental action does not automatically become reasonably related to the achievement of a legitimate and substantial governmental purpose by mere assertion in the preamble of an ordinance. When it is shown that state action threatens significantly to impinge upon constitutionally protected freedom, it becomes the duty of this Court to determine whether the action bears a reasonable relationship to the achievement of the governmental purpose asserted as its justification.
>
> *Bates v. Little Rock*, 361 U.S. 516, 525 (1960)

That is why this Court should grant certiorari in this case. The First Amendment must not be totally scrapped to satisfy non-essential economic goals. The goal of repairing the Armory building, and even expanding public use of the Drill Hall, did not present a compelling case for taking over all the his-

toric spaces in the Administration Building for use as restaurants and corporate reception rooms, blocking a chartered military history museum, and ending the veterans' meetings and events that had taken place in the Armory for many years.

In the present case, the individual plaintiffs have suffered injuries-in-fact by their eviction from the Armory where they served for many years as veteran-volunteers for Seventh Regiment programs. The association plaintiffs have suffered injury-in-fact by the closing of access to the Regimental Rooms in the Armory to everyone except private restaurant customers. Both individual and association plaintiffs have suffered First Amendment injury-in-fact in the deprivation of their association and assembly rights in these spaces, and in the blocking of historic programs and installation of museum exhibits in those same spaces. These injuries-in-fact have all come about because of the challenged state legislation, and can be remedied by the Court's declaration of the unconstitutionality of the statute and restoring the *status quo ante*. They therefore establish Article III standing. See *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-561 (1992). As the Court noted in that opinion:

> The relevant showing for Article III standing is not injury to the environment, but injury to the plaintiff.

Here injury to Petitioners includes both the loss of personal access to the Armory and elimination of their fundamental First Amendment free speech and associational and assembly rights.

ARGUMENT

POINT I

PETITIONER INDIVIDUAL MILITARY VETERANS HAVE LIBERTY AND PROPERTY RIGHTS OF ACCESS TO THE ARMORY FOR MILITARY, EDUCATIONAL AND RECREATIONAL PURPOSES WHICH GIVE THEM STANDING TO CHALLENGE THE CONSTITUTIONALITY OF STATE DENIAL OF ARMORY ACCESS AS A VIOLATION OF THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

Prior to the disputed State takeover and transfer, individual Petitioners Fitzgerald and Wells each had regular access to the Seventh Regiment Armory. In addition to their roles as officers and directors of the Regiment's Historical Society, they performed responsibilities at the Armory as often as several times a week in various Regimental support groups.

Fitzgerald and Wells, with the full approval of the Regiment's officers, regularly used and occupied office and meeting space in the Armory to work on Regiment-related projects. They, like other veterans of the Regiment, were also members of its Veterans Organization which held regular executive committee meetings in the Armory and an annual dinner in the Veterans' Room.

The District Court never heard oral argument on the motion to dismiss, and never asked any questions about the details of plaintiffs' interest in the property, which was adequately and properly alleged in summary fashion in the Complaint. Had the Court asked for details, the District Judge would have

learned the extent of the regular occupation and use of the Armory by Plaintiffs Fitzgerald and Wells as operations officers of various Seventh Regiment functions and activities (such as the Seventh Regiment Fund and the Seventh Regiment Rifle Club).

In the proceedings in the Court of Appeals (which had *de novo* jurisdiction to consider the facts and law on the motion to dismiss) the individual Petitioners made the following offer of proof:

If called as a witness, Kenyon Fitzgerald would testify that at the time the state legislation was adopted in August, 2004, he and Peter Wells, and other members of the Veterans of the Seventh Regiment (established in 1859) had regular, and unrestricted access and use of the Administration Building and the Drill Shed. The Seventh Regiment Fund, of which Fitzgerald is president, and its employee-curators, had access to all areas of the Armory [except the Company K room on the second floor where ownership of the contents remained with the Associates of the Engineer Corps of Company K]. The Seventh Regiment Fund (est. 1909) maintained an office on the first floor, off the original Library Room (known since 1947 as the Silver Room) where Mr. Fitzgerald regularly did his work for The Fund.

The Veterans of the Seventh Regiment maintained a special room in the Administration Building from the time of the building's completion in 1881. The veterans held monthly meetings of their Board of Management from October through May, plus two general membership meetings in June and December in the Veterans Room (on the first floor of the Armory). Over the years, numerous social functions

were held by the Veterans, both for themselves, and as sponsors for Regimental socials.

If called as a witness, Plaintiff Peter Wells would testify: Wells regularly worked as a volunteer in the Armory on the affairs of the Seventh Regiment Rifle Club and the Friends of the Seventh Regiment. He performed his duties at the Armory year-round at least once a week—sometimes three nights a week. The Rifle Club had regular shooting nights once or twice a week and dinner afterward. A night would often start at 4 p.m. and end at 10 p.m. The Rifle Club was confined to veterans and at various times had as many as 100 members. The Club room was in the basement and also the firing range was there. The annual meeting of the Rifle Club was held in the Veterans Room. In addition, both Petitioners attended regular Board meetings and Executive Committee meetings.

The State Takeover and Transfer

The Defendants wrested control of the Armory under a scenario in which state legislation—adopted without debate in the Legislature's closing hours—evaded any discussion of proposed benefits. The turnover of the Armory was adopted "to benefit a particular class of identifiable individuals"—the very individuals whose lawyers wrote and engineered the statute, bestowing benefits upon them—employing a two-step scheme through (1) enactment of Chapter 482, and (2) issuance of the 99-year lease under the new law to a pre-selected party—the Conservancy. The Conservancy's claim that this was done pursuant to an open-bidding procedure is a farce. As the Complaint alleges, the process was tailor-made from the start for one bidder only—the Conservancy.

This linking scheme, transferring the property to ESDC, and then from ESDC through a long-term lease to the favored private entity selected under a rigged-bidding scheme, effected an unconstitutional taking. The Conservancy's counsel boasted about the law firm's accomplishment on the firm's website:

> 9/22/2004
>
> **Governor Pataki Signs Into Law a Bill Drafted by Paul, Weiss**
>
> Lewis R. Clayton, Meredith J. Kane
>
> On September 22, 2004, Governor Pataki signed into law a bill drafted by Paul, Weiss lawyers that facilitates the restoration and reuse by our client the Seventh Regiment Armory Conservancy, Inc. of the historic Seventh Regiment Armory building located at Park Avenue and 66th Street. The new law, which amends provisions of the New York Military Law and the New York Urban Development Corporation Law regarding the use, disposition and renovation of the armory, enables our client to enter into a long-term lease of the Armory, to restore its extraordinary 19th century architectural and decorative splendor, and to open it to the public as a performing and visual arts center. The renovation will be accomplished with a mix of public and private funds. The bill, which was passed at the very end of the New York State legislative session, just after adoption of New York State's 2005 fiscal year budget, was drafted by Meredith Kane and Elizabeth Stein, with input from Lew Clayton.
>
> (Complaint, Ex E)

Note that the description of the legislation is that it "enables our client" to enter into a long-term lease of the Armory. This in turn assured that the "client" would collect millions of dollars in exhibition rents, ticket revenues and catering income from the property. From the outset, the Legislature's action was crafted to transfer private property from "A" to "B" in direct violation of the Supreme Court majority's language in *Kelo*, "under the mere pretext of a public purpose."

It is precisely this impermissible government manipulation to benefit known private entities that is specifically prohibited by the *Kelo* interpretation of the Takings Clause.

Facts Establishing Plaintiffs' Standing

The Seventh Regiment Armory is in a class by itself. Unlike every other armory in the nation, it was built with private funds. For 130 years it was owned and managed by Seventh Regiment Trustees. (Complaint Ex C) Those Trustees not only had responsibility for the care and operation of the Armory, but they had an additional obligation under the City lease of the public land to insure that the Armory was "used exclusively for an armory and drill rooms by said regiment."

Early in the performance of their fiduciary duties, the Seventh Regiment Trustees were told by the Courts of New York that any attempt to enter into an agreement with anyone "granting exclusive use of a large and valuable room" [in that case the "Veteran's Room"—now scheduled for a commercially-operated reception facility] "for purposes entirely separate and distinct from an armory or drill rooms for

the regiment" would be "a breach of trust." That is what has now happened.

> The armory in question, as already stated, is a public building, devoted to a public use, and the board of field officers to whom the same was leased under the provisions of the act of 1874, before referred to, hold the same really as trustees for the public, for public purposes, and upon the express condition that the site is to be thereafter exclusively held and used for an armory and drill rooms by said regiment. Green's Brice, Ultra Vires, p. 120. As such trustees, the board of field officers were not authorized to divert the use of the building in any way from the public use to which it was devoted by the various acts of the legislature under which it was erected; * * *.
>
> *Veterans of Seventh Regiment v. Field Officers*, 60 Hun 578, 14 NYS 811, 816 (1891)

The Court ruled that any such agreement would be "absolutely void, as not within the power of the [trustee] defendants" and would constitute "a violation of their duty as trustees." *Id.* at 817.

Commercial Restaurant Takeover

The Conservancy lease provides for a high-priced restaurant, bar and catered reception spaces in the historic Regimental rooms on the First Floor of the historic Armory, plus a series of private corporate reception rooms in the landmarked Company rooms on the Second Floor. (Appendix, pages 37a to 43a)

The historic spaces that are being restored with public funds will be used to provide exclusive pri-

vate dining facilities for well-to-do customers, business executives, and ticket-holders for concerts and performances. The level of these services is clearly demonstrated by the three caterers and restaurateurs selected by the Conservancy to submit proposals for operating these spaces year-round. They include the entrepreneurs who operate the expensive "Four Seasons" Restaurant in the Seagram Building, and the former "Windows on the World" in the World Trade Center (with its famed wine cellar). (Appendix, pages 37a-39a)

In its 1992 resolution giving the Armory's interior rooms official landmark status, the NYC Landmarks Preservation Commission made particular mention of the beauty of the Veterans' Room and the Library on the First Floor of the Armory:

> ". . . the Veterans' Room and Library, designed and decorated by Associated Artists (Louis C. Tiffany & Co.), are considered among the most beautiful and significant surviving interiors of the American Aesthetic Movement . . ."

The Conservancy's plans for the First Floor calls for use of these "most beautiful and significant" rooms as a commercially-operated catered reception area with a combined capacity of 215 persons.

The Conservancy's use of all of the officially designated historic Regimental and Company interior spaces as attractions for an elite clientele of upper income individuals, priced to exclude the general public, violates the Constitution's "public use" clause and makes a mockery of the tributes to the sacrifice and heroism of the ten Congressional Medal of Honor awardees and other soldiers who served in the Seventh Regiment and its successors,

along with citizen-soldiers and other military service men and women currently serving in combat areas abroad—plus those who served this country in the past during the Civil War, World Wars I and II, Korea, Vietnam, the Persian Gulf and other wars. (Complaint pars. 61-67)

Denial of 14th Amendment Rights

Following the passage of the 2004 state legislation and execution of the Development Corporation lease in 2006, these veterans were denied all access to the Armory.

Footnote 17 to the *Kelo* majority opinion notes that:

> These types of takings may also implicate other constitutional guarantees. See *Village of Willowbrook v. Olech*, 528 U.S. 562 (2000) (per curiam).
>
> *Kelo v. New London*, 545 U.S. 469, 487 (2005)

In *Village of Willowbrook*, it was the scheme itself that bestowed standing on the plaintiffs, by depriving them of Equal Protection.

The applicability of the Equal Protection Clause was explained in Justice Kennedy's Concurring Opinion in Kelo:

> A court applying rational-basis review under the Public Use Clause should strike down a taking that, by a clear showing, is intended to favor a particular private party, with only incidental or pretextual public benefits, just as a court applying rational-basis review under the Equal Protection Clause must strike down a government classification that is clearly intended to injure a

> particular class of private parties, with only incidental or pretextual public justifications. See *Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 446-447, 450 (1985); *Department of Agriculture v. Moreno*, 413 U.S. 528, 533-536 (1973).
>
> *Kelo v. New London*, 545 U.S. 469, 491 (2005)

Excluding veterans from spaces in the Armory in favor of wealthy patrons does not pass the test for equal protection of the law.

Veterans' Right of Association

Military veterans share a special bond growing out of their common experience in uniform which most ordinary civilians cannot begin to understand. This special spirit of camaraderie often takes the form of joining veterans' associations (like the American Legion or Disabled American Veterans) and in dinners, picnics, Memorial Day observances or other regular gatherings.

It is an important liberty interest embodied in the constitutional right to free association and assembly, recognized by this Court as deserving of protection in *Bates v. Little Rock*, 361 U.S. 516 (1960).

The state legislation here that closed the Armory to veterans is one of the injuries-in-fact that supports the veterans' standing to bring this case.

Subject to the 'Closest Scrutiny'

State action seizing control of space previously freely and wholly accessible to war veterans does not simply implicate Fifth and Fourteenth Amendment protections. The wresting of control of the

Armory space also effected the sheering off of regular personal contact, the 'esprit de corps' of shared experiences, and the associations and shared values of comrades-at-arms. This arbitrary deprivation of place and associations echoes the fundamental violations first raised by this Court in the Civil Rights Cases and later summarized in *Buckley v. Valeo*. "In view of the fundamental nature of the right to associate, governmental "action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny." *NAACP v. Alabama, supra* at 460-461." *Buckley v. Valeo*, 424 U.S.1, 25 (1976)

Where associational freedoms are impinged, this Court has required heightened scrutiny:

> As our past decisions have made clear, a significant encroachment upon associational freedom cannot be justified upon a mere showing of a legitimate state interest. *Bates v. Little Rock*, supra, at 524; *NAACP v. Alabama*, supra, at 463.
>
> *Kusper v. Pontikes*, 414 U.S. 51, 58-59 (1973)

If previously free unrestricted association has any constitutional protection—especially for America's war veterans—then the restriction of this most fundamental right is subject to the strictest scrutiny and the state statutes affecting such rights must be drawn with precision. Here, the change in control of an historic structure is not all that is involved. The sudden, arbitrary and severe change in use has 'unnecessarily burden[ed] or restrict[ed] constitutionally protected activity' without appropriate tailoring to serve legitimate objectives.

Armory Property Rights

The Court of Appeals, like the District Court, took a narrow and literal approach to defining whether military veterans have any ownership rights in the Armory which would give them standing to challenge the Armory taking under the Fifth Amendment. That approach was too simplified for such a complex institution with a long history.

The New York Court of Appeals squarely held that the Armory was owned by the Regiment itself.

> It was clearly the purpose of the Legislature to recognize that the building in question is owned by the regiment.
>
> *Tobin v. Laguardia*, 276 NY 34, 43 (1937)

The legislation put that ownership in the hands of Trustees. Who are the beneficiaries of that Trust?

(1) Are they only the current Regiment members in uniform and on active duty?

(2) Are they retired members (like Mr. Wells) and other Seventh Regiment veterans he represents?

(3) Are they the legal heirs of those who contributed money to build and furnish the Armory in the 19th century?

(4) Are they those who contribute "sweat equity" into the Armory (like Mr. Fitzgerald and Mr. Wells)?

We argue that each and all of these are joint owners of the Armory, and that each has Article III standing to challenge the Conservancy's taking of the Trustee-owned Armory as unconstitutional.

When a soldier leaves active duty, he does not erase all past associations, friendships, memories or

ties with the Regiment and fellow soldiers. It is a wholly artificial argument to assert that a veteran of the Seventh Regiment no longer has any liberty or property interest in the Regiment's headquarters and meeting spaces. That continuing interest is symbolized by the very name of "The Veterans' Room"—the principal gathering space dedicated to and used for gathering by individuals who have served in the Regiment. The formal contractual exclusion of Plaintiffs and their military colleagues under Chapter 482 from use of the Veterans Room deprives them of a liberty interest and property right, and sharply illustrates the unconstitutional effects of Chapter 482.

The Nature of "Property Right"

At the time of the 2004 state legislation, the Armory was privately owned by the Regiment's Field Officers as Trustees for the Regiment. The individual Petitioners assert they were beneficial users of the Armory as officers of the Regiment's support and affiliated organizations.

> *Beneficial use.* The right to use and enjoy property according to one's own liking or so as to derive a profit or benefit from it, including all that makes it desirable or habitable, as light, air, and access; as distinguished from a mere right of occupancy or possession. Such right to enjoyment of property where legal title is in one person while right to such use or interest is in another.
>
> *Black's Law Dictionary*,
> Fifth Ed., West, 1979

Locke Vision of Property and The Constitution

The Framers' concept of "property" as used in the Constitution drew upon principles of natural law espoused by John Locke, the English philosopher whose writings on natural rights influenced the Founders.

Locke's theory of property revolved around the concept that property is a natural right, and that property is derived from labor. A central concept was that government could not dispose of the estates of subjects arbitrarily.

Significantly here, Locke's Second Treatise of Government[3], the one on which the Framers based their concepts of natural rights and property rights, considered that civil society was created for the protection of property. His source was the etymology of the very word "property"—from Latin, "proprius,"—that which is one's own, and from French, "propre"—in which he included the concepts "life, liberty and estate."

From Locke we derive the concepts of "life, liberty and property" of the Fifth Amendment. But to Locke, life and liberty were co-equals with what is now considered "real property." Each man owned himself, at a minimum, and he owned his own labor and the fruits of it. The relationship between the state and its citizens consisted in a contract to provide order and protection by the state. Everything a person had, everything that pertained to him, could

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3 "Two Treatises of Government: In the Former, The False Principles and Foundation of Sir Robert Filmer, And His Followers, are Detected and Overthrown. The Latter is an Essay concerning The True Original, Extent, and End of Civil-Government".

be attributed to him was his property, including his good name.

The only justifiable government deprivation of property was by 'the law of the land,' or what has come to be known as 'due process.'

> The precise nature of the interest that has been adversely affected, the manner in which this was done, the reasons for doing it, the available alternatives to the procedure that was followed, the protection implicit in the office of the functionary whose conduct is challenged, the balance of hurt complained of and good accomplished—these are some of the considerations that must enter into the judicial judgment.
>
> *Joint Anti–Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 163 (1951) (Justice Frankfurter concurring)

Plaintiffs' interest in the Armory are as bound up with the Lockean concept of "property" and "liberty" as it is with the definition of what is "due process" under the circumstances of this case.

> Whoever, by virtue of public position under a State government, deprives another of property, life, or liberty without due process of law, or denies or takes away the equal protection of the laws, violates the constitutional inhibition; and, as he acts under the name and for the State, and is clothed with the State's power, his act is that of the State. This must be so, or the constitutional prohibition has no meaning.
>
> *Ex parte Virginia*, 100 U.S. 339, at 346-347 (1879) quoted in Justice Harlan's dissent in the *Civil Rights Cases*, 109 U.S. 3, 57-59 (1883)

These Petitioners satisfy both the common sense and philosophical principles of Armory ownership rights.

Aesthetic and Recreational Rights

Plaintiffs have suffered an injury-in-fact by being denied free and open use and enjoyment of the Armory's aesthetic and recreational resources as a National Historic Landmark, not unlike the aesthetic and recreational rights of bird-watchers and animal welfare activists in environmental cases. See *Friends of the Earth, Inc., et al v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167, 181-183 (1999).

Article III Amendment Standing

Petitioners have a triple ground for Article III standing:

(1) They each had a property interest in the armory at the time of the challenged state takeover legislation; and

(2) They each had an aesthetic and recreational right to enjoy the unique historic rooms and artifacts in this National Historic Landmark; and

(3) They also possessed First Amendment rights in the Armory that give them standing to sue—rights of association, assembly and free speech—all of which have been damaged and injured by the state legislation effectively denying them access to the Armory.

These three principle grounds support Petitioners' standing as Plaintiffs in the declaratory action and related claims below.

Chief Justice John Marshall said,

> The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws whenever he receives an injury. One of the first duties of government is to afford that protection. * * * The Government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation if the laws furnish no remedy for the violation of a vested legal right.
>
> *Marbury v. Madison*, 5 U.S. 137, 163 (1803)

The remedy here lies in the Fifth Amendment takings, due process and public use clauses, and recognition of these Petitioners' injuries under the First, Fifth and Fourteenth Amendments to the United States Constitution.

The combination of the Armory's original 19th century Lease and Regiment Trustee ownership, together with the individual petitioners' long service to the Seventh Regiment's support groups gives them constitutionally-protected liberty and property interests in the Armory sufficient to establish their standing in this case.

POINT II

MILITARY VETERANS HAVE A FREE SPEECH RIGHT TO OFFER MUSEUM PROGRAMS AND EXHIBITS IN THE ARMORY'S PUBLIC SPACES TO EDUCATE VISITORS ABOUT THE ROLE OF CITIZEN-SOLDIERS IN AMERICA'S WARS, AND THAT RIGHT WAS DENIED BY STATE ACTION VIOLATING THE FIRST, FIFTH AND FOURTEENTH AMENDMENTS

On October 23, 1964, the Board of Regents of the State of New York granted an absolute charter to the 107th Infantry Regiment (Seventh, New York) Historical Society to establish and maintain a military history museum.

> Board of Regents Minutes October 23, 1964, Absolute Charter, *107th Infantry Regiment (Seventh New York) Historical Society*, An absolute charter is granted incorporating George K. Brazill, L. Emory Boyden, Walter A. Capitain, Joseph A. Cox, P. Randolph Harris, George F. Johnston, Kenneth C. Miller and Leslie M. Stewart as trustees.
>
> The purposes for which such corporation is to be formed are:
>
> a. To collect, receive, and preserve books, papers, documents, diaries, letters, records, citations, battle streamers, flags, honors, metals, decorations, and other memorabilia pertaining to the Seventh Regiment, New York National Guard;
>
> b. To maintain a museum and library for the care and custody thereof;

c. To assist in maintaining the historical continuity of this distinguished regiment, regardless of changes in tactical organization in peace and war;

d. To provide an opportunity for the individual soldier to become familiar with the history and traditions of the Seventh Regiment;

e. To maintain records of members of the said regiment; and

f. To direct or conduct research into the history of the Seventh Regiment, and to publish the results of such research.

Recognition that there is a strong need for a humanistic military history museum is supported by scholars, historians and particularly those who have served as citizen-soldiers in recent U.S. military engagements and have received little or no public understanding of the sacrifices such service involves[4]. The Board of Regents charter provides the seed for such a museum.

The Funding Issue

The obvious source of funding for planning, installing and operating a first-class museum on America's citizen-soldiers in the Seventh Regiment Armory is out of the rental income the Armory receives from the annual antique art and antiquarian book shows held in the Armory's Drill Hall. In past years, the State withheld these funds. Now the State has agreed to turn them over, not to the Regiment, but directly to the defendant Conservancy as the

[4] See, e.g., statement of Thomas Fleming, President of the American History Association, at LafayetteFreedomCenter.org.

Empire State Development Corporation's lessee. (Complaint pars 41-50)

Taking advantage of the potential for generating additional income from the interior landmarked Regimental and Company rooms in the Administration Building—formerly used by the Seventh Regiment and its veterans—the Development Corporation's lease requires that these spaces be converted and used as commercial rental space for restaurants and cocktail reception areas—destroying all hopes of preserving those spaces for the Armory's public purposes to present military history museum programs or museum exhibits for visitors.

These rooms themselves are prime artifacts and the most obvious site for interpreting the more than hundred years of military use by the Regiment and its officers.

Set out in the Appendix are exhibits from the Complaint showing the floor plans for the first and second floors of the Administration Building from the Conservancy's lease, along with the lease schedules providing for future use of these historic landmarked rooms for commercial restaurant and reception purposes. (See Appendix, pages 40a-43a)

Equal Protection Standing

The District Court also rejected any claim that Plaintiffs were denied equal protection as a basis for standing:

> * * * Plaintiffs have failed to show that they were "able and ready" to apply to the ESDC's request for proposals to restore and renovate the Armory. Although Plaintiffs assert that they were prevented from doing so because the Con-

> servancy, not they, received a monetary grant for proposed restoration and renovation, this does not state an equal protection violation.
>
> (Appendix page 20a)

In *Clements*, this Court ruled that the Plaintiffs, officeholders who resisted violating the very statute whose constitutionality they were challenging lest they lose the offices they held, were not asserting a hypothetical controversy simply because they failed to experience the ultimate sanction.

> Baca's dispute with appellants over the constitutionality of § 19, therefore, cannot be said to be abstract or hypothetical, since he has sufficiently alleged that § 19 has prevented him from becoming a candidate for the legislature.
>
> *Clements v. Fashing*,
> 457 U.S. 957, 962-963 (1982)

Just as the appellees in *Clements* would not announce their candidacy for higher office (and violate the challenged statute) yet retained a justiciable controversy, here, the veteran-Petitioners did not waive their opportunities for meeting and assembling and for mounting their long-planned and long-chartered museum by failing to apply to the ESDC as lessees—particularly since they were already in occupancy as officers of Seventh Regiment affiliated and support organizations.

The facts alleged in the Complaint here made clear the linking scheme entirely orchestrated by a private law firm for its private client with interests in direct conflict with the rights of the veterans who regularly used and met in the Armory. To require these veteran Petitioners to challenge that scheme

by participating in it comports neither with due process nor equal protection.

There is no bright line classification rule when it comes to repugnance to the Equal Protection clause. "The prohibition of the Equal Protection Clause goes no further than the invidious discrimination." *Williamson v. Lee Optical Co.*, 348 U. S. 483, 489 (1955)

The veterans were under no obligation to respond to the RFP in a scheme entirely against their long-standing interests to use the Armory for meetings and events and to establish a museum within the walls of a structure they had long called 'home' and long used in service to the military purposes for which it was first constructed. In addition to that conflict with the challenged ESDC scheme—all masterminded by the very private party that would receive preferential, favored treatment "invidious" to the veterans, and thus supporting the veterans' equal protection claim—that conflict also supports their First Amendment claim.

A first-class human interest military history museum program and exhibits is an obvious objective for exercise of plaintiffs' First Amendment rights. The huge success of the Intrepid aircraft carrier navy history museum berthed on the West Side of Manhattan shows the level of public interest available for an equivalent army history museum just a few blocks away on Manhattan's East Side.

The obvious response to the District Court's rejection of the Armory site for the museum is—where else would you put such a museum? The Armory is where recruits were enlisted and drilled in preparation for wartime service, and where the regimen-

tal officers and veterans returning home met and told "war stories" during peacetime. The historic and aesthetic importance of the spaces has been certified by the New York City Landmarks Preservation Commission and U.S. Department of the Interior. The rooms should certainly not be demeaned as high-end Park Avenue restaurants for the well-to-do, while American military veterans are *de facto* denied access.

Deprivation of Plaintiffs' liberty interests by the New York legislature destroyed all possibility of establishing public museum programs and exhibits telling the story of America's citizen soldiers in the landmark interior rooms on the first and second floors of the Armory, which was plain injury-in-fact giving Plaintiffs standing to file this action.

POINT III

VETERANS ASSOCIATION PETITIONERS HAVE A STATUTORY RIGHT OF FREE ACCESS TO THE ARMORY'S "VETERANS ROOM" AND OTHER REGIMENTAL ROOMS FOR MEETINGS AND SOCIAL EVENTS, AND THAT RIGHT WAS DEPRIVED THROUGH STATE ACTION IN VIOLATION OF NEW YORK STATE MILITARY LAW SECTION 183 AND THE FIRST, FIFTH AND FOURTEENTH AMENDMENTS

In New York State, veterans have a statutory free right to use any armory in the state. That right was arbitrarily cancelled for the Seventh Regiment Armory by the challenged state statute.

The District Court (and the Circuit Court during argument) dismissed the DAV's objection to the loss of that right by asserting

> The Armory is owned by the State, and, assuming that Plaintiffs have a limited statutory right of access to the Armory upon application, Plaintiffs have not alleged that they have applied for and been denied access to the Armory.
>
> (Appendix, page 22a)

That response misses the point. It is not simply the change in control that is involved here, but the change in use. As noted above, all of the first and second floor meeting rooms have now been assigned under the lease itself for use as commercial restaurants, cocktail lounges and reception spaces. (Appendix, pages 37a to 43a) The free meeting spaces for veterans' organizations have simply been taken away. High-priced restaurants are no substitute for free historic regimental and company rooms lined with battle flags and memorabilia.

Plaintiff-Appellant Sidney Siller is Department Adjutant for the Disabled American Veterans, Department of New York, Inc.; and a disabled veteran of World War II and the U.S. military force in Korea in 1945 and 1946. The Disabled American Veterans Department of New York, Inc. is one of the veterans organizations expressly granted free use of armories in New York State for regular and special meetings and organization events under Section 183 of the Military Law of New York State. The DAV brings this action on its own behalf and, along with Sidney Siller, as class representative for members of other veterans' organizations granted similar rights under such law.

All of these veterans' organizations had the statutory right to use the Seventh Regiment Armory for free meeting space prior to the challenged 2004 legislation which eliminated that right by closing off all available meeting spaces in the Armory Administration Building. The limitation of military space to two small offices on the third floor of the Armory is the equivalent of the "Laidlaw discharges" that prevented the recreational activities enjoyed by FOE member Kenneth Lee Curtis, bestowing on him Article III standing due to injury-in-fact. (*Friends of the Earth, Inc., et al v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167, 181-182 (1999)) The two third floor offices assigned for military use under the ESDC lease amount to 1.4% of the total square footage in the Administration Building, while the Conservancy occupies over 98.6% of the space. (Complaint, par. 90)

Favored Parties and Preferential Treatment

The Supreme Court has held that individual rights guaranteed by the Fourteenth Amendment prohibit state bestowal of benefits on favored parties through preferential treatment, even where the act may be assumed to be done in good faith. The Veterans organizations in New York State have all been effectively excluded from the Armory by assigning the Armory meeting spaces to commercial restaurant and catering use. This constitutes injury-in-fact giving them standing to bring this action. See, *Regents of the University of California v. Bakke*, 438 U.S. 265, 319-320 (1978).

The State has effectively shut out one identifiable population group in favor of another, effecting state

affirmative preferential treatment prohibited by the Fourteenth Amendment.

The action is prohibited under *Kelo* for favoritism; the action is prohibited under *Bakke* for exclusion. The Petitioner veterans organizations have been classified as undesirable entrants onto the property by the very state action encompassed by the legislative scheme favoring others. The classifications are insidious because they are not express. But they are as real as if they were express in the legislation and in the lease it effected.

Most offensive to veterans (and other citizens) is denial of access to the Armory space honoring recipients of the Congressional Medal of Honor—the nation's highest military award for valor—by its conversion into an entrance hall for the Conservancy's commercial banquet and reception area.

In the cases that have come to be known as the civil rights cases, the First Amendment protection of association was claimed as a shield against disclosure of membership lists in *Bates v. Little Rock*, 361 U.S. 516, 524-527 (1960). The Supreme Court recognized that association was a fundamental liberty right due special protections in the balance of state's interest.

While the disclosure of NAACP membership lists in Alabama at the height of the civil rights struggle cannot be compared to abridgement of associational freedom of veterans of the armed forces, the fundamental liberty interest is the same, those rights of assembly and association—not for political purpose, but for purposes much more basic and fundamental to the protection of liberty: former comrades-at-

arms finding companionship in a place dedicated to the purpose.

The principle in common with the disclosure of NAACP membership lists in the *Bates* case that exists here is the limitation on freedom of association in violation of equal protection and in violation of the rule enunciated by this Court. (*Id.* at 525)

CONCLUSION

All of the first and second floor meeting rooms of this historic Armory—previously wholly dedicated to military use—have now been assigned under the state's lease for exclusive use as commercial restaurants, cocktail lounges and reception spaces, preventing use by the military veterans—Petitioners here—who formerly used or had free access to them.

It is difficult to describe what such *de facto* eviction means to former soldiers who have survived battle and returned home to share bonds in a special setting bespeaking a spirit shared with those who have, for generations in the same great tradition, gone before them. This is the formless thing whose deprivation was described by this Court in *Harman v. Forssenius* and cited in *Dunn*. " 'Constitutional rights would be of little value if they could be . . . indirectly denied'. . . ." *Dunn v. Blumstein*, 405 U.S. 330, 341-342 (1972) (Footnotes omitted.)

See also *Gomillion v. Lightfoot*, "'It is inconceivable that guaranties embedded in the Constitution of the United States may thus be manipulated out of existence.' *Frost & Frost Trucking Co. v. Railroad Commission of California*, 271 U.S. 583,

594." [*Gomillion v. Lightfoot*, 364 U.S. 339, 346 (1960)]

The question for this Court is not merely one of who has standing to challenge state action that deprives property, but whether these veterans have standing to challenge state deprivation of cognizable rights under the First, Fifth and Fourteenth Amendments that have been injured through state action. Is their past and ongoing association in a specific historic and sacred setting a liberty interest that may not be summarily and arbitrarily deprived through state action?

The fundamental question in this case is whether the State Legislature can take away Petitioners' Constitutional rights in the course of transferring a privately-owned historic building and land lease to a favored private group.

We ask that the Court grant this Petition for Certiorari, and recognize the standing of Petitioners to litigate the full case on the merits.

Respectfully submitted,

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GABRIEL NORTH SEYMOUR

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO SUMMARY ORDERS FILED AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY THIS COURT'S LOCAL RULE 32.1 AND FEDERAL RULE OF APPELLATE PROCEDURE 32.1. IN A BRIEF OR OTHER PAPER IN WHICH A LITIGANT CITES A SUMMARY ORDER, IN EACH PARAGRAPH IN WHICH A CITATION APPEARS, AT LEAST ONE CITATION MUST EITHER BE TO THE FEDERAL APPENDIX OR BE ACCOMPANIED BY THE NOTATION: "(SUMMARY ORDER)." A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF THAT SUMMARY ORDER TOGETHER WITH THE PAPER IN WHICH THE SUMMARY ORDER IS CITED ON ANY PARTY NOT REPRESENTED BY COUNSEL UNLESS THE SUMMARY ORDER IS AVAILABLE IN AN ELECTRONIC DATABASE WHICH IS PUBLICLY ACCESSIBLE WITHOUT PAYMENT OF FEE (SUCH AS THE DATABASE AVAILABLE AT HTTP://WWW.CA2.USCOURTS.GOV/). IF NO COPY IS SERVED BY REASON OF THE AVAILABILITY OF THE ORDER ON SUCH A DATABASE, THE CITATION MUST INCLUDE REFERENCE TO THAT DATABASE AND THE DOCKET NUMBER OF THE CASE IN WHICH THE ORDER WAS ENTERED.

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 16th day of November, two thousand and nine.

Present:

ROSEMARY S. POOLER,
ROBERT A. KATZMANN,
DEBRA ANN LIVINGSTON
Circuit Judges.

(09-0354-cv)

KENYON B. FITZGERALD JR., PETER SCOVILLE WELLS, SIDNEY SILLER, DISABLED AMERICAN VETERANS DEPARTMENT OF NEW YORK, INC.,

Plaintiffs-Appellants,

—v—

WADE F. B. THOMPSON, ELIHU ROSE, ARIE L. KOPELMAN, STEPHEN LASH, EDWARD KLEIN, REBECCA ROBERTSON, KIRSTEN REOCH, CHARLES GARGANO, WILLIAM SHERMAN, CAROL BERGENS, JOHN DOE, MARY ROE, SEVENTH REGIMENT ARMORY CONSERVANCY, INC.,

Defendants-Appellees.

Appearing for Appellants: Whitney North Seymour, Jr. (Gabriel North Seymour, *on the brief)*

Appearing for Appellees: Lewis R. Clayton (Barbara R. Llanes, *on the brief)*, Michael S. Belohlavek, Senior Counsel (Patrick J. Walsh, Assistant Solicitor General of Counsel, *on the brief)*, *on behalf of* Andrew M. Cuomo, Attorney General of the State of New York

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Appeal from the United States District Court for the Southern District of New York (Jones, J).

ON CONSIDERATION WHEREOF, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of said District Court be and it hereby is **AFFIRMED**.

This case relates to a proposed restoration of the Seventh Regiment Armory (the "Armory") located at 643 Park Avenue in Manhattan. Appellants filed a complaint seeking, *inter alia*, declaratory judgment and injunctive relief invalidating a 2004 New York State statute authorizing a 2006 lease of the Armory to the Seventh Regiment Armory Conservancy, Inc. ("Conservancy"). Appellants argued that the statute violated several of their constitutional rights under the First Amendment, the Takings Clause of the Fifth Amendment, and the Due Process and the Equal Protection Clause of the Fourteenth Amendment. On January 5, 2009, Judge Barbara Jones granted defendants' motion to dismiss on the grounds that plaintiffs lacked standing. Appellants now appeal from this judgment. We assume the par-

ties' familiarity with the underlying facts, procedural history, and specification of issues for review.

This Court reviews a district court's dismissal of a complaint under rules 12(b)(1) and (6) *de novo*. *Jaghory v. N.Y. State Dep't of Educ.*, 131 F.3d 326, 329 (2d Cir. 1997). Further, we must accept all factual allegations in the complaint as true and draw inferences in the light most favorable to the appellants. *Id.*

Upon review, we conclude that the district court was correct that appellants did not have Art. III standing. The "irreducible constitutional minimum" of standing has three elements:

> (1) there must be an "'injury in fact,'—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical;" (2) there must be "a causal connection between the injury and the conduct complained of;" and (3) "it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision."

Port Washington Teachers' Ass'n v. Bd. of Ed. of Port Washington, 478 F.3d 494, 498 (2d Cir. 2007) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)). Appellants have failed to show any injuries in fact.

First, appellants' complaint failed to allege a property interest in the Armory. *U.S. Olympic Comm. v. Intelicense Corp., S.A.*, 737 F.2d 263, 268 (2d Cir. 1984) ("Only the owner of an interest in property at the time of the alleged taking has standing to assert that a taking has occurred."). The complaint con-

tends that, the Armory is privately owned by "the trustees of the Seventh Regiment Armory fund," but fails to allege that appellants are the trustees or the successors of the trustees. Instead, appellants bring this action as veterans (although only Wells is a veteran of the Seventh Regiment specifically), and directors of the 107th Infantry Regiment Historical Society. They allege no official connection between the Seventh Regiment Historical Society, and the Seventh Regiment of the National Guard or its sucessor unit, the 107th Corps Support Group of the New York Armory National Guard. Therefore, Appellants have no standing to bring a takings claim.

Second, Appellants argue they have been denied a free speech right to "tell[ ] stories of the experiences of citizen-soldiers" by installing a military history museum, a free association right to hold Armory meetings with other veterans based on "collegiality and shared experiences," and a statutory right to free access to the Armory. They argue that Chapter 482 (and the Conservancy plans to convert interior spaces into "commercial restaurant, cocktail lounge and banquet and reception facilities") "effectively" denies them free access.

Appellants do not argue that Chapter 482 on its face violates any of appellants' asserted rights, nor did their complaint allege that Chapter 482 has been applied to violate these rights. Chapter 482 changes the access procedure to the Armory only in that appellants must now submit their application for access to a different person. N.Y. Mil. Law. §180-a (3)(c)(i). Appellants did not allege that they have applied for and been denied access. *See Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 166-67 (1972) (finding plaintiff lacked standing to challenge

racially discriminatory membership policy because he had never applied for membership). At present, any injury is hypothetical.

Any injury from failure to install a museum is similarly hypothetical because appellants did not allege that they have applied for and been denied access to use the Armory for a museum. Even if appellants were denied, they have not asserted a right to build a museum in the Armory. While the Armory may be, as appellants assert, a natural choice for the museum, the Historical Society Charter to build a museum does not state where the museum will be located, and makes no mention at all of the Armory. Thus, appellants have not shown any right to install a museum in the Armory.

The Equal Protection Claim fails for the same reasons: Chapter 482 does not deny appellants access to the Armory on its face, nor did they allege that they have been denied access in fact. Appellants have not alleged that they have been treated differently than any other group.

Accordingly, the judgment of the district court hereby is AFFIRMED.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk

By: _____

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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07 CV 6851 (BSJ)

KENYON B. FITZGERALD, JR., PETER SCOVILLE WELLS, SIDNEY SILLER, and DISABLED AMERICAN VETERANS DEPARTMENT OF NEW YORK, INC.,

Plaintiffs,

—v—

WADE F.B. THOMPSON, ELIHU ROSE, ARIE L. KOPELMAN, STEPHEN LASH, EDWARD KLEIN, REBECCA ROBERTSON, KIRSTEN REOCH, CHARLES GARGANO, WILLIAM SHERMAN, CAROL BERGENS, JOHN DOE, MARY ROE and SEVENTH ARMORY CONSERVANCY, INC.,

Defendants.

OPINION & ORDER

BARBARA S. JONES
UNITED STATES DISTRICT JUDGE

This action relates to the proposed restoration and renovation of the historic Seventh Regiment Armory (the "Armory") located at 643 Park Avenue in Manhattan. Plaintiffs Kenyon B. Fitzgerald, Jr. ("Fitzgerald"), Peter Scoville Wells ("Wells"), Sidney

Siller ("Siller") and the Disabled American Veterans Department of New York, Inc. (collectively, "Plaintiffs") seek declaratory and injunctive relief invalidating the New York statute authorizing a lease of the Armory to the Seventh Regiment Armory Conservancy (the "Conservancy"). Plaintiffs assert that the enactment and implementation of this statute violates certain provisions of the Constitution of the United States and several of the Plaintiffs' rights under state common law. In response, Defendants Carol Berens and William Sherman ("State Defendants"), and Defendants Wade F.B. Thompson, Elihu Rose, Arie L. Kopelman, Stephen Lash, Rebecca Robertson, Kirsten Reoch, and the Conservancy (the "Conservancy Defendants") (collectively, the "Defendants"), each move to dismiss Plaintiffs' Complaint, pursuant to Federal Rules of Civil Procedure 12(b)(1), 12(b)(5), and 12(b)(6). For the reasons that follow, the Court GRANTS their motions.

BACKGROUND[1]

Plaintiffs Fitzgerald and Wells are veterans of the Armed Forces of the United States purporting to

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[1] The following factual allegations are taken from the Complaint and the exhibits attached thereto. The Court does not consider the exhibits and affidavits filed by Defendants unless otherwise noted. In determining a motion to dismiss, the Court's review is generally limited to the Complaint, as well as any documents incorporated by reference therein. *See U.S. ex. rel. Ellis v. Sheikh*, No. 05-CV-6146L, 2008 WL 4761875, at *2 (W.D.N.Y. Oct. 31, 2008); *but see Papasan v. Allain*, 478 U.S. 265, 269 (1986) ("[A]lthough this case comes to us on a motion to dismiss under Federal Rule of Civil Procedure 12(b), we are not precluded in our review of the complaint from taking notice of items in the public record.").

represent a class of Seventh Regiment veterans. (Compl. ¶¶ 3-4.) Fitzgerald and Wells are also officers of the 107th Infantry Regiment Historical Society (the "Historical Society") (Compl. ¶¶ 3-4.), an organization granted a charter by the New York State Education Department in 1964 to collect memorabilia from the Seventh Regiment and establish a museum of such memorabilia (Compl. ¶ 41). Plaintiff Siller is the Department Adjutant for the Disabled American Veterans Department of New York, Inc. (Compl. ¶ 5), a veteran's organization granted use of the armories in New York (Compl. ¶ 6). Siller is himself a veteran, although not of the Seventh Regiment. (Compl. ¶ 5.)

Built in the 1870s for the Seventh Regiment—which traces its provenance to a militia battalion formed in 1824 as the "National Guard"—the Armory is a National Historic Landmark. (Compl. ¶¶ 12-13.) In an 1873 statute, the New York State legislature directed the City to lease to field officers of the Seventh Regiment, and their successors in office, a plot of ground belonging to the City for "the public purposes of said regiment." (Compl. ¶ 16.) The field officers of the Seventh Regiment were authorized and empowered to accept the lease and the site on behalf of the Regiment to be thereafter "exclusively used for an armory and drill rooms by the Regiment." (Compl. ¶ 16.) On September 23, 1874, pursuant to further State legislation enacted that year, the City and the field officers entered into such a lease (the "1874 lease"). (Compl. ¶ 18.) The terms of the lease were extended on April 23, 1879 (the "1879 lease") "for and during the period the regiment shall exist and act as a military organization, and desire

to occupy said armory for its lawful purposes." (Compl. ¶ 19.)

Under a law also passed in 1879, the New York State legislature authorized the board of officers of the Seventh Regiment to issue bonds in the name of the Regiment to complete construction of the Armory building. (Compl. ¶ 21.) In order to secure payment of the bonds, the legislature authorized the board of officers to convey the leased property and the Armory to "the trustees of the Seventh Regiment Armory fund" and their successors "in trust." (Compl. ¶ 21.) The bonds, issued and sold in 1879, were redeemed from private monies raised from donations and several private groups affiliated with members of the Regiment. (Compl. ¶ 21-22.) No State funds were used in erecting the Armory. (Compl. ¶ 23.)

By a statute passed in 1893, the field officers of the Seventh Regiment were designated as Trustees of the Armory ("Trustees"). (Compl. ¶ 24.) The Trustees are responsible for holding the Armory solely and exclusively for the public purposes of the Regiment. They are also charged with the duty of maintaining and improving the Armory. (Compl. ¶ 24, Ex. C.) In recent years, however, the Armory has fallen into a state of disrepair. (Compl. ¶ 35.)

In or about July 2000, without consent or approval of the Trustees, the Empire State Development Corporation ("ESDC") and the State Division of Military and Naval Affairs ("DMNA") issued a Request for Proposals ("RFP"), purporting to seek a developer for the reuse of the Armory. (Compl. ¶ 36.) The RFP purported to offer the Armory a lease to such developer, "without regard to the terms of the City's lease or the ownership rights of the Regiment." (Compl.

¶ 36.) In response to the RFP, the Conservancy, a not-for-profit corporation organized under the laws of the State of New York (Compl. ¶ 10), submitted its bid for restoration of the Armory (Compl. ¶ 37). On September 9, 2001, ESDC issued a letter designating the Conservancy the "Preferred Proposer" for the restoration of the Armory. (Compl. ¶ 37.)

In order to implement the Conservancy's plan, in August of 2004, the New York State Legislature enacted Chapter 482 of the Laws of 2004 ("Chapter 482"). (Compl. ¶ 38.) Chapter 482 amended the Military Law of the State of New York and the New York State Urban Development Act. (Compl. ¶ 38.) Chapter 482 provides, in short, for (1) the lease of the Armory to the Conservancy for 99 years; (2) the restoration and preservation of the Armory building; (3) the use of the Armory for civic and cultural events; (4) the continued military character of the Armory; and (5) the continued presence of the women's shelter on the premises. (Compl. ¶ 38, Ex. D.)

Based upon the foregoing facts, the Complaint asserts the following causes of action. Claim One asserts a violation of the Due Process Clause of the Fourteenth Amendment of the United States Constitution on the ground that Chapter 482 constitutes a taking of both the Seventh Regiment's property, the Armory's property, and Plaintiffs' right of access to the Armory. (Compl. ¶¶ 70-72.) Claim Two asserts a violation of the Public Use Clause of the Fifth Amendment of the Constitution on the ground that the lease of the Armory to the Conservancy is an improper transfer of the Seventh Regiment's property for the benefit of a known private party, and that the stated public purpose of Chapter 482 is

incidental to the private benefits that will be conferred upon the Conservancy. (Compl. ¶¶ 74-77.) Claim Three asserts a violation of the Contracts Clause of the Fifth Amendment of the Constitution on the ground that Chapter 482 did not establish any public purpose to justify cancellation of the City's 1874 and 1879 leases of Armory property to the Regiment and its successor units. (Compl. ¶¶ 79-80.) Claim Four asserts a violation of section 10 of the New York State Urban Development Corporation Act (the "UDCA"), which requires the ESDC to make a finding of need for a civic project in the area in which the project is to be located. (Compl. ¶¶ 82-91.) Claim Five asserts that Defendants tortiously interfered with the City's 1874 and 1879 leases through "bid rigging, illegal favoritism and fraud." (Compl. ¶¶ 92-93.) Claim Six asserts a claim for imposition of a constructive trust and accounting of all funds received by the Conservancy. (Compl. ¶¶ 95-99.) Finally, Claim Seven asserts violations of 42 U.S.C. § 1983 on the ground that Defendants deprived Plaintiffs of their constitutionally protected statutory and contractual rights, their rights to expression, their right of assembly and statutory right of access to the Armory, and their due process and equal protection rights under the Fourteenth Amendment of the Constitution. (Compl. ¶¶ 101-04.)

DISCUSSION

I. Defendants' Challenges

Defendants seek to dismiss Plaintiffs' Complaint on the grounds that (1) Plaintiffs lack standing to maintain this action; (2) this Court lacks personal jurisdiction over several individual Defendants:

(3) the Complaint fails to state a claim under either the Public Use or Contract Clauses of the Fifth Amendment of the Constitution; (4) a violation of the UDCA is a state claim that this Court does not have jurisdiction to adjudicate; (5) the Complaint fails to state a claim for tortious interference of a contract under New York law; (6) the Complaint fails to state a claim for constructive trust; and (7) there is no independent cause of action alleged under 42 U.S.C. § 1983.[2] For the reasons that follow, the Court GRANTS Defendants' motions to dismiss the Complaint in its entirety.

II. Standing

Article III standing is properly challenged through a motion to dismiss under Rule 12(b)(1). *Alliance for Envtl. Renewal, Inc. v. Pyramid Crossgates Co.*, 436 F.3d 82, 88 n.6 (2d Cir. 2006). A district court must generally establish that a plaintiff has Article III standing first, before deciding a case on the merits, such as on a Rule 12(b)(6) motion to dismiss. *See id.* at 85 (citing *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 101 (1998)). Standing is challenged on the basis of the pleadings, and thus the Court accepts as true "all material allegations of the complaint, and must construe the complaint in favor of the complaining party." *Bldg. & Constr. Trades Council v. Downtown Dev., Inc.*, 448 F.3d 138, 144 (2d Cir. 2006).

The doctrine of standing is well established to require that the party who wishes to bring suit must

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[2] The State Defendants and the Conservancy Defendants set forth almost identical arguments in support of their motions to dismiss. Unless otherwise noted, the Court discusses both sets of challenges jointly.

have suffered an injury to a legally protected right, an "injury in fact." *Warth v. Seldin*, 422 U.S. 490, 95 (1975); *Baker v. Carr*, 369 U.S. 186 (1962). "An injury-in-fact must be 'distinct and palpable,' as opposed to 'abstract,' and the harm must be 'actual or imminent,' not 'conjectural or hypothetical.' " *Denney v. Deutsche Bank AG*, 443 F.3d 253, 264 (2d Cir. 2006) (citing *Whitmore v. Arkansas*, 495 U.S. 149, 155-56 (1990)). Here, Plaintiffs claim that they have Article III standing on the basis of the Fourteenth Amendment to the United States Constitution. (Pls.' Opp'n Mem. to Defs.' Mots. Dismiss ("Pls.' Opp'n"), at 6.) According to Plaintiffs, their "standing to bring this action, and to seek relief under each of the seven claims alleged in the complaint," is rooted in the Due Process Clause, the Equal Protection Clause, the Privileges and Immunities Clause, and their substantive due process rights. (Pls.' Opp'n at 6-12.) The injuries-in-fact Plaintiffs identify in their Complaint include the denial of access, control, and use of the Armory for traditional military and related purposes; the prevention of the establishment and operation of a military history museum and interpretive program in the Armory's historic spaces for public education; the denial to veterans organization members of the right of free use of the Armory for meetings and gatherings; and the deprivation to City and State taxpayers of support for publicly-funded cultural institutions by diverting audience and donor revenues to the Conservancy and its favored organizations. (Compl. ¶¶ 69(a)-(d).)

A. *Due Process*

Turning first to Plaintiffs' contention that they have standing to bring this action under the Due Process Clause, the Court holds that Plaintiffs have no constitutionally protected right in the Armory sufficient to confer standing. Plaintiffs have not been deprived of a life interest: "lifetime respect, honor, gratitude and compassion" are not judicially cognizable rights. (Pls.' Opp'n at 7.) Likewise, Plaintiffs have failed to demonstrate precisely how or in what manner their liberty interests have been violated.

Plaintiffs allege that they have a liberty right under the First Amendment to express and associate with other veterans. (Pls.' Opp'n at 7.) Yet, the Court sees no evidence of an obstruction by Defendants of the rights of Plaintiffs to express their opinions freely or to associate with one another. The factual predicate as presented to the Court on this point consists of an inability to "tell the stories of [Plaintiffs] military service, and advocate and install a military history museum in the Armory." (Pls.' Opp'n at 7) Although the Conservancy's charter does not permit it to operate a museum (Compl. ¶¶ 42, 50, 69), the Historical Society's charter does not mention the Armory and does not mandate that any museum of the Seventh Regiment's memorabilia be located therein (Compl. ¶ 41). Thus, Plaintiffs have failed to allege a palpable injury on this ground.

Furthermore, by the express terms of Chapter 482, veterans' groups may have access to the Armory on application to the Conservancy. Chapter 482 amended section 183 of the New York Military Law, which provided that veterans' groups could have access to the Armory on application to the officer in charge of

the Armory. Chapter 482 merely shifted the responsibility of granting access to the Armory from the officer in charge of the Armory to the lessee of the Armory, the Conservancy. (Conservancy Defs.' Mem. at 21.) The Complaint does not allege that the Conservancy has taken any steps affirmatively to restrict applications by veterans groups. The Complaint also does not allege that Plaintiffs have made any such application to access the Armory. Accordingly, Plaintiffs are unable to demonstrate more than an injury that is merely speculative.[3] Cf. *Laird v. Tatum*, 408 U.S. 1, 13-14 (1972) (holding that the mere knowledge that the army was surveilling civilian political activity and the fear of detriment if information thus gained were distributed was not sufficient injury to the plaintiffs' First Amendment rights because there was no allegation of specific objective harm, either present or future); *Women's Emergency Network v. Bush*, 323 F.3d 937, 946-47 (11th Cir. 2003) (holding that plaintiffs failed to allege that their First Amendment rights had been violated by a specialty license plate law when the State had not rejected plaintiffs' license plate application).

Plaintiffs also assert that Fitzgerald and Wells have a property interest in the Armory as veterans

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[3] Plaintiffs' additional assertion that they have a constitutional right to petition the courts for redress of their grievances fails because no such allegation is contained in their Complaint. Plaintiffs may not use their opposition papers to amend the Complaint by including a new cause of action. *See Shah v. Helen Hayes Hosp.*, No. 06-4068-CV, 2007 U.S. App. LEXIS 25323, at *4 (2d Cir. Oct. 29, 2007) ("A party may not use his or her opposition to a dispositive motion as a means to amend the complaint.") (citing *Wright v. Ernst & Young LLP*, 152 F.3d 169, 178 (2d Cir. 1998)).

of the Seventh Regiment and as representatives of its successor organizations, including its Historical Society. (Pls.' pp'n at 7.) As an initial matter, the language of Section 1 of Chapter 482 provides a history of the 1874 lease that confirms that the Armory is State property:

> It is also found and declared that leasehold title to the seventh regiment armory *is the property of the state* under an indenture of lease made on September 23, 1874 between the "mayor, aldermen and commonality of the city of New York" as lessors, and the "field officers of the seventh regiment of the national guard of the state of New York," as lessees, which field officers were later redesignated as the trustees of the seventh regiment armory building . . . , as amended by an indenture of lease dated April 23, 1879.

(Compl., Ex. D. (2004 N.Y. Laws Ch. 482 § 1) (emphasis added)); *see also Dalva v. Pataki*, No. 116965/05, Slip Op. at 15 (N.Y. Sup. Ct. Mar. 3, 2006) ("The State defendants' argument convinces me that the State is, indeed, the lessee of the Armory, and may, therefore, claim the rights of a lessee."). Even if the Armory were the property of the Seventh Regiment, however, Fitzgerald and Wells, as veterans, are *not* representatives of the Regiment and thus have no property interest in the Armory. *Veterans of Seventh Regiment v. Field Officers of Seventh Regiment, et al.*, 14 N.Y.S. 811, 815 (N.Y. App. Div. 1891) ("[V]eterans of the seventh regiment . . . are not members of said regiment, and the delegation of power to the field officers of said regiment to exclusively hold

and use the property leased for an armory and drill rooms by said regiment would ordinarily and naturally exclude the idea of a joint adventure with other parties.").

Further, there is no support for Plaintiffs' claim that the 107th Infantry Regiment Historical Society is a successor organization of the Seventh Regiment. (Pls.' Opp'n at 7.) Plaintiffs have not alleged any official connection between the Seventh Regiment and the Historical Society, which is described in the Complaint as a private organization founded in 1964. (Compl. ¶ 41.) Indeed, the record evinces that the actual successor organization to the Seventh Regiment is the 107th Corps Support Group. (Compl., Ex. D (2004 N.Y. Laws Ch. 482 § 1) ("The 107th corps support group, a division of the New York state national guard, is recognized by the department of the army and the courts of the state of New York as the lineal descendent of the seventh regiment . . . .").) Plaintiffs therefore have not asserted "such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions." *Baker*, 369 U.S. at 204.

In this same regard, even if Plaintiffs had standing to assert that Chapter 482 and the Conservancy lease violate the Contracts Clause of the Fifth Amendment, it is axiomatic that the Contracts Clause—which provides in pertinent part that "No State shall . . . pass any . . . Law impairing the obligation of Contracts," U.S. Const. art. I, § 10—is inapplicable to the relationships between states and their municipalities. *Trenton v. New Jersey*, 262 U.S. 182, 188 (1923) ("The power of the State, unre-

strained by the contract clause . . . over the rights and property of cities held and used for "governmental purposes" cannot be questioned."). Moreover, a "city cannot possess a contract with the State which may not be changed or regulated by state legislation." *Id.* (citing *Town of E. Hartford v. Hartford Bridge Co.*, 51 U.S. 511 (1851)); *see also New York v. Richardson*, 473 F.2d 923, 929 (2d Cir. 1973) ("[P]olitical subdivisions of a state may not challenge the validity of a state statute under the Fourteenth Amendment"). Applying these principles, Plaintiffs' claim alleging that Chapter 482 impaired a contract between officers of the City of New York and officers of the State National Guard cannot withstand scrutiny.

B. *Equal Protection Clause*

Although Plaintiffs do not specifically allege equal protection of the laws as a cause of action, Plaintiffs state within their 42 U.S.C. § 1983 claim that, operating under color of state law, Defendants deprived them of "their due process and *equal protection* rights under the Fourteenth Amendment." (Compl. ¶ 102 (emphasis added).) The Court finds this sufficient to put Defendants on notice of an equal protection claim. Plaintiffs' equal protection argument, however, fails.

"Although a plaintiff need not suffer an injury in fact to have standing to assert an Equal Protection Clause claim, because standing is created by the denial of equal treatment resulting from the imposition of a barrier, not the ultimate inability to obtain the benefit, a plaintiff must nonetheless demonstrate that he was able and ready to apply for a disputed program in order to establish standing."

Filozof v. Monroe Comm. College, No. 04-CV6545L, 2008 WL 4737400, at *9 (W.D.N.Y. Oct. 28, 2008) (citing *Gratz v. Bollinger*, 539 U.S. 244, 262 (2003)). As applicable here, Plaintiffs have failed to show that they were "able and ready" to apply to the ESDC's request for proposals to restore and renovate the Armory. Although Plaintiffs assert that they were prevented from doing so because the Conservancy, not they, received a monetary grant for proposed restoration and renovation, this does not state an equal protection violation. (Pls.' Opp'n at 26.) The Conservancy received the funds because their proposal was selected by ESDC. Furthermore, Plaintiffs have not alleged that they attempted to apply, or would have applied, for access to the Armory but for the proposed enactment of Chapter 482. *See Clements v. Fashing*, 457 U.S. 957 (1982) (noting that plaintiff's standing to challenge a program on Equal protection grounds is not vitiated by plaintiff's failure to attempt participation, if it is alleged that the plaintiff would have done so, had he not been barred by the challenged policy). Thus, Plaintiffs lack standing to challenge Chapter 482 upon the facts alleged.

C. *Privileges and Immunities Clause*

Plaintiffs maintain that they have standing to bring this action based upon the Privileges and Immunities Clause of the Fourteenth Amendment. (Pls.' Opp'n at 8-10.) This cause of action is not alleged in Plaintiffs' Complaint and therefore Plaintiffs may not raise the issue for the first time in their opposition papers. *Shah*, 2007 U.S. App. LEXIS 25323, at *4. Even were the Court to consider Plaintiffs' claim, it is without merit. Contrary to Plaintiffs'

assertions, veterans do not necessarily enjoy special privileges under the Privileges and Immunities Clause. *See Carrabus v. Schneider*, 119 F. Supp. 2d 221, 230 (E.D.N.Y. 2000) (veterans' preferences in county employment created by State law were not essential attributes of national citizenship, and thus did not merit protection under the Fourteenth Amendment Privileges and Immunities Clause).

D. *Substantive Due Process*

Plaintiffs principally argue that their substantive due process rights have been violated by the improper transfer of private property from the Armory Trustees to the Conservancy, in violation of the Takings Clause of the Fifth Amendment. (Pls.' Opp'n at 14-15.) The Takings Clause provides that "private property [shall not] be taken for public use without just compensation." U.S. Const. amend. V. This language has long been understood to guarantee that "one person's property may not be taken for the benefit of another private person without a justifying public purpose, even though compensation be paid." *Thompson v. Consol. Gas Utils. Corp.*, 300 U.S. 55, 80 (1937); *see also Hawaii Hous. Auth. v. Midkiff*, 467 U.S. 229, 245 (1984). The Fifth Amendment's prohibitions are applicable to the states through the Fourteenth Amendment. *Phillips v. Washington Legal Found.*, 524 U.S. 156, 163-64 (1998); *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 160 (1980).

Although Plaintiffs do not allege an outright usurpation of their private property, similar to takings claims premised on land use restrictions, the crux of Plaintiffs' claim is that the enactment of Chapter 482 and the authorization of the Conser-

vancy lease are inconsistent with the physical property and use rights they claim. *Seventh Regiment Fund v. Pataki*, 179 F. Supp. 2d 356, 36162 (S.D.N.Y. 2002). As explained *supra*, however, Plaintiffs do not have a property interest in the Armory. The Armory is owned by the State, and, assuming that Plaintiffs have a limited statutory right of access to the Armory upon application, Plaintiffs have not alleged that they have applied for and been denied access to the Armory. Moreover, although veterans and Seventh Regiment members donated funds for the building of the Armory in the 1870s, those donations did not create a property interest in the Armory itself. *Veterans of Seventh Regiment*, 14 N.Y.S. at 816. Because only those with cognizable property interests have standing to bring takings claims, Plaintiffs lack standing to raise the alleged substantive due process claim. *U.S. Olympic Comm. v. Intelicense Corp., S.A.*, 737 F.2d 263, 268 (2d Cir. 1984) ("Only the owner of an interest in property at the time of the alleged taking has standing to assert that a taking has occurred.").

E. *Other Possible Grounds for Standing*

The Complaint includes two other allegations relevant to the standing inquiry: (1) Plaintiff Wells is a New York State and City "taxpayer" (Compl. ¶¶ 3-5); and (2) Plaintiffs were denied access and use of the Armory's rental proceeds, giving rise to an action for tortious interference with contract and the imposition of a constructive trust (Compl. ¶¶ 92, 95-99).

The Complaint alleges that Wells is a New York State and City "taxpayer" (Compl. ¶¶ 3-5), and attacks Chapter 482 for "[d]epriving City and State taxpayers of support for publicly-funded cultural

institutions by diverting audience and donor revenues to the Conservancy and its favored private charities and arts organizations" (Compl. ¶ 69(d)). This claim would perhaps have merit if pleaded as a "taxpayer action," which is a procedural vehicle afforded by New York State Finance Law § 123-b with respect to State action, and by New York General Municipal Law § 51 with respect to municipal action. Given that neither procedural vehicle is mentioned in the Complaint, nor is such a common-law cause of action included among the seven claims in the Complaint, Plaintiff Wells has no standing to challenge Chapter 482 or the Conservancy's lease as a New York State or City taxpayer. *See Daimler-Chrysler Corp. v. Cuno*, 547 U.S. 332, 345 (2006) (plaintiffs lacked standing to challenge a tax break granted by state and local officials because their interests as taxpayers "in the moneys of the [government] treasury are too indeterminable, remote, uncertain and indirect to support standing").

Plaintiffs' tortious interference claim fares no better. (Compl. ¶ 92.) This claim alleges that "Defendants' wrongful actions caused injury and damages to plaintiffs by denying them access and use of the Armory and its rental proceeds." (Compl. ¶ 92.) The Armory's rental proceeds, however, never accrued to Plaintiffs. Before the enactment of Chapter 482, the rental proceeds went to DMNA headquarters, with half the funds paid as rent to the State Treasury and the other half distributed among the units of the organized militia located within the state. N.Y. Military Law § 183(5). After the enactment of Chapter 482, the lessee (in this case, the Conservancy)

> shall be required to apply all revenues generated by operations at the Armory to pay

> or provide for the costs of repairs, restoration, refurbishment, operating, maintenance and programming of the Armory and the uses therein and the activities of the lessee or subsequent lessee with respect thereto.

(Compl., Ex. D (2004 N.Y. Laws Ch. 482 § 3).) Because Plaintiffs have never been entitled to any portion of the Armory's rental revenues, they cannot establish that they personally have suffered some actual or threatened injury as a result of the putatively illegal conduct of Defendants. *Alliance for Envtl. Renewal, Inc.*, 436 F.3d at 85. Accordingly, Plaintiffs lack standing to maintain an action for tortious interference of contract, or for the imposition of a constructive trust and a concomitant accounting, on the basis of denied rental revenues.

F. *State Law Violation*

Even assuming Plaintiffs had standing, their claim that the Conservancy lease should be voided for "fraud and failure to comply with the [New York State Urban Development Act] in material respects" is not properly before this Court. (Compl. ¶ 91.) Under New York law, when a plaintiff seeks to assert that a determination of a governmental body or public official is "in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion" and seeks nullification of such action, an Article 78 proceeding is the appropriate vehicle to address the claim. *Abiele Contracting, Inc. v. N.Y. City Sch. Constr. Auth.*, 666 N.Y.S.2d 970, 972-73 (N.Y. 1997). New York law, however, vests jurisdiction over Article 78 proceedings solely in state courts. N.Y.C.P.L.R.

§ 7804(b) ("A proceeding under this article shall be brought in the supreme court in the county specified [by statute]."). District courts sitting in New York have refused to impinge upon this exclusive jurisdiction. *See, e.g.*, *Blatch v. Hernandez*, 360 F. Supp. 2d 595, 637 (S.D.N.Y. 2005) ("This [Article 78] claim must be dismissed for lack of subject matter jurisdiction, as New York State has not empowered the federal courts to consider such claims."). Accordingly, the Court concludes that it lacks jurisdiction to consider Plaintiffs' UDCA claim.

CONCLUSION

For the reasons stated above, Defendants' motion to dismiss the Complaint in its entirety is GRANTED. The Clerk of the Court is directed to close the case.

SO ORDERED:

/s/ BARBARA S. JONES
BARBARA S. JONES
UNITED STATES DISTRICT JUDGE

Dated: New York, New York
January 5, 2008

LEASES—CORPORATIONS—
SEVENTH REGIMENT ARMORY

CHAPTER 482

A. 11817

Approved and effective September 21, 2004

AN ACT to amend the military law and the New York state urban development corporation act, in relation to a lease of the seventh regiment armory to a not-for-profit corporation

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Additions are indicated by underline; deletions by ~~strikeout~~; vetoes by shading

§ 1. Statement of legislative findings and purposes. It is hereby found and declared that New York state's Seventh Regiment Armory, located in the city of New York, is an important historic landmark; that it has been a prominent center of cultural and civic events since its construction in 1879; that it is of great military historic value; that the continued ability to operate the seventh regiment armory for military purposes in times of civil or military emergency is vitally important to the city and state, and that the physical restoration and refurbishment of the armory is necessary and important to preserve this structure for current and future generations of New Yorkers.

It is further found and declared that the armory is an important civic and cultural facility for the community in which it is located and for the residents of

the city and state; and that the continued use of the armory for cultural events and other civic uses is beneficial to the health, safety, welfare, and education of the people of the city and the state, and is consistent with the armory's purpose as a military facility.

It is further found and declared that a portion of the armory has been successfully utilized for a range of activities, including use as a shelter for homeless women that has been operated by the city of New York and that continued use of a portion of the armory as a shelter for homeless women is beneficial to the health, safety, welfare and education of the people of the city and state, and is consistent with the armory's purpose as a military facility and is contemplated pursuant to this legislation.

It is further found and declared that the armory has suffered deterioration in its physical infrastructure and plant in recent decades and that the continued deterioration of the facility must be remedied and reversed; that the renovation of the armory will require the investment of many millions of dollars and that financial circumstances make such public expenditures very difficult.

It is further found and declared that the restoration and renovation of the armory is in the public interest and that a partnership between the state and the private sector is necessary to undertake the financing of the restoration and future operation of this historic structure; that the division of military and naval affairs and the urban development corporation issued a request for proposals from interested private sector organizations in the year 2000 to undertake the restoration and operation of the

armory. A not-for-profit organization, the seventh regiment armory conservancy, was named as chosen developer and deemed to fulfill all financial, organizational and operational requirements to undertake this endeavor in partnership with the state.

It is further found and declared that leasehold title to the seventh regiment armory is the property of the state under an indenture of lease made on September 23, 1874 between "the mayor, alderman and commonality of the city of New York," as lessors, and "the field officers of the seventh regiment of the national guard of the state of New York," as lessees, which field officers were later redesignated as the trustees of the seventh regiment armory building (Chapter 518 of the Laws of 1893), as amended by an indenture of lease dated April 23, 1879. The 107th corps support group, a division of the New York state national guard, is recognized by the department of the army and the courts of the state of New York as the lineal descendent of the seventh regiment, and the field officers of the 107th corps support group are recognized as the current trustees of the armory and successors in interest to the lessee under the above-cited leases, subject to the supervision of the New York state division of military and naval affairs. Pursuant to this act, the armory is under the general charge and control of the adjutant general, the commanding general and senior military officer of the New York state national guard.

Therefore, it is hereby found and declared that it is in the public interest for the state, acting through the division of military and naval affairs by the authority of the adjutant general, to enter into a public/private partnership with a not-for-profit cor-

poration dedicated to the preservation of the armory as a historical, civic and cultural facility for the community to undertake the renovation and operation of the armory and to exercise the rights and powers herein authorized. Furthermore, such lease and all development-related activities, as well as any subsequent leases or development-related activities, shall be administered by the empire state development corporation on behalf of the division of military and naval affairs and the state.

§ 2. The military law is amended by adding a new section 180-a to read as follows:

§ 180-a. Lease and operation of seventh regiment armory

1. Definitions. (a) "Adjutant general" shall mean adjutant general of the state of New York.

(b) "Armory" shall mean the seventh regiment armory located at 101-129 East 66th street, 100-126 East 67th street, 888-898 Lexington avenue and 641-649 Park avenue, in the county of New York, state of New York and identified as Block 1401, Lot 1 on the tax map of in the city of New York bounded by Park and Lexington avenues and Sixty-sixth and Sixty-seventh streets.

(c) "City lease" shall mean collectively, the leases dated September 23, 1874 and April 23, 1879 by and between the mayor, aldermen and commonality of the city of New York to the field officers of the seventh regiment.

(d) "Division" shall mean the state division of military and naval affairs, established by article nine of the executive law.

(e) "Lease" shall mean a lease for a term of up to ninety-nine years to be entered into between the state, acting through the urban development corporation, as lessor, and the lessee, as tenant, leasing the armory or portions thereof.

(f) "Lessee" shall mean the tenant, a not-for-profit corporation dedicated to the preservation of the armory as a historical, civic and cultural facility for the community, which is party to a lease with the state, acting through the urban development corporation as landlord, leasing the armory or portions thereof.

(g) "Management agreement" shall mean an agreement to be entered into by the state, acting through the urban development corporation, providing for the management of the armory on a short-term basis on behalf of the state as part of the routine or continuing administration and management of the armory.

(h) "Military use" shall mean during periods which are not periods of civil or military emergency, use of a portion of the armory containing approximately twenty-one hundred square feet, or such lesser area as the division may determine, located in the portion of the armory which is not a designated New York city landmark (i.e., not in the historic rooms located on the first and second floors or the drill hall), for offices or administrative functions of the division, and use by the division during any periods of civil or military emergency.

(i) "Periods of civil or military emergency" shall mean any period during which an order of the adju-

tant general directing a response to a civil or military emergency is in effect. Said order shall have effect in relation to this section only in the event of an order by the adjutant general specifically asserting control of areas within the armory.

(j) "Shelter use" shall mean use during periods which are not periods of civil or military emergency, the city of New York shall have the right to access and use sufficient and suitable space for the current and uninterrupted operation of the shelter by the city of New York, as well as usual and customary building services and utilities, including but not limited to heat, water and electric, for use as a shelter for homeless persons.

(k) "Urban development corporation" shall mean the New York state urban development corporation, a public benefit corporation of the state, doing business as the empire state development corporation.

2. State ownership of facility and fixtures. (a) The state, acting through the division, is and shall be recognized as and declared to be the lawful successor to the interest of the lessee under the city lease. No other person or party, whether through claims or entitlements of past or continuing use, occupancy, improvement or otherwise, is or shall be recognized as having any lawful rights in respect of the armory other than as may be expressly granted by, and subject to, the applicable subdivisions of section one hundred eighty-three of this article.

(b) All improvements, betterments, fixtures, equipment, ornaments, decorative elements, and similar items affixed or attached to the armory

building (i.e., all items other than moveable personal property which is not affixed to the walls or other parts of the building) are hereby recognized and declared to be an integral part of the armory and property of the state, and any and all persons who have heretofore installed or paid for the installation of any of the foregoing items are deemed to have donated such items to the state as of the time of the installation of such items in the armory.

3. Lease and operation of armory; certain provisions of this chapter not applicable. (a) Except with respect to expenditures made by the state or the division in connection with military use or the operation of the armory during a period of civil or military emergency, the following provisions of this article shall not apply to the repair, restoration, refurbishment or operation of the armory pursuant to the lease or the management agreement: section one hundred seventy-eight, subdivisions two and three of section one hundred eighty and section one hundred eighty-one.

(b) The provisions of section one hundred eighty-two of this article shall apply only with respect to military use of the portions of the armory not demised under the lease, and with respect to periods of civil or military emergency, and shall not apply to the operations of the armory under the lease or the management agreement.

(c) Except with respect to military use and during periods of civil or military emergency, section one hundred eighty-three of this article shall not apply to the operations of the armory pursuant to the lease or the management agreement. The following

provisions shall apply in lieu of such section one hundred eighty-three:

(i) On application of any of the associations of veterans described in paragraph b of subdivision one of such section one hundred eighty-three, the lessee or the manager pursuant to the terms of the management agreement shall provide a proper and convenient room or rooms or other appropriate space in the armory where such posts or chapters may hold regular and special meetings and organizational social events of a private nature, without the payment of any charge or expense therefor, provided that such use does not interfere with the use by the lessee or the manager pursuant to the terms of the management agreement, including any use by third parties contracted for under subparagraph (ii) of this paragraph.

(ii) The armory may be used by any person, firm, association, corporation, or municipal entity, provided that such person, firm, association or corporation enters into an agreement with the lessee or the manager pursuant to the terms of the management agreement permitting such use. The terms of any agreement entered into between the lessee or the manager pursuant to the terms of the management agreement and a user shall provide for such usage to cease during any periods of civil or military emergency.

(d) The provisions of sections one hundred eighty-five, one hundred eighty-six and one hundred eighty-seven of this article shall not apply to the armory.

(e) The management agreement and lease shall not apply to shelter use. Shelter use shall be gov-

erned by a separate agreement between the city of New York, the lessee and the state of New York; such separate agreement shall be executed prior to the execution of the lease.

§ 3. Section 1 of chapter 174 of the laws of 1968, constituting the New York state urban development corporation act, is amended by adding a new section 39 to read as follows:

§ 39. Lease and operation of seventh regiment armory. (a) The corporation is hereby authorized to act on behalf of the state and the division of military and naval affairs to enter into a lease or subsequent leases and the management agreement on behalf of the state and the division with a lessee, subsequent lessee or the manager pursuant to the terms of the management agreement in order to accomplish the purposes of this section. The leasing of the armory to a lessee or subsequent lessee and the entrance into the management agreement and the repair, restoration and refurbishment of the armory and operation thereof by a lessee or subsequent lessee for cultural and other civic uses pursuant to the lease is hereby declared to be a valid use under the city lease, and is undertaken for public purposes.

(b) The lease with a lessee or subsequent lessee authorized by this section shall require a lessee or subsequent lessee to undertake a program of repair, restoration and refurbishment of the armory and to manage and use the same as a facility for cultural and other civic uses. The lease shall demise all portions of the armory other than those reserved for a homeless shelter for women operated by the city of New York pursuant to agreement with the state and for that reserved for military use by the division.

The portion of the premises allocated to the shelter for homeless women shall be sufficient and suitable space for the current and uninterrupted operation of the shelter by the city of New York. The division shall cause the 107th corps support group or its lineal descendent to maintain military use within the reserved portions of the armory. The division, and the city of New York, respectively, shall be responsible to repair and maintain their reserved premises, including the costs of renovation and uninterrupted use, and to pay an annual common maintenance charge to a lessee or subsequent lessee to cover allocated costs of repair, maintenance and operation of the common portions of the armory. The lessee or subsequent lessee shall be required to apply all revenues generated by operations at the armory to pay or provide for costs of repairs, restoration, refurbishment, operating, maintenance and programming of the armory and the uses therein and the activities of the lessee or subsequent lessee with respect thereto.

(c) The corporation, in carrying out its authorization under this section may exercise all of the power granted it in law, as if fully enumerated herein. Without limiting the generality of the foregoing, the powers granted to the corporation under sections sixteen and twenty-two of this act shall be utilized by the corporation in its administration of the lease, and shall be applicable in respect to the repair, restoration, refurbishment and operation of the armory pursuant to the lease.

(d) In no event shall the lessee or subsequent lessee be deemed a state actor or an agent or an instrumentality of the state by reason of the lease or

this section or any of the activities of the lessee or subsequent lessee with respect to the armory pursuant to the lease or this section.

(e) Except with respect to military use or periods of civil or military emergency, for any action involving the armory that may have a significant effect on the environment, the corporation shall be the lead agency having principal responsibility for carrying out or approving such action for purposes of article eight of the environmental conservation law.

§ 4. Construction. This act, being necessary for the welfare of the state and its inhabitants, shall be liberally construed so as to effect its purposes.

§ 5. Severability clause. If any section, clause or provision of this act shall be unconstitutional or be ineffective in whole or in part, to the extent that it is not unconstitutional or ineffective it shall be valid and effective and no other section, clause or provision shall on account thereof be deemed invalid or ineffective.

§ 6. This act shall take effect immediately.

[LETTERHEAD OF 7TH REGIMENT
ARMORY CONSERVANCY RESTAURANT, LLC]

October 6, 2000

Mr. Wade Thompson
Chairman
Seventh Regiment Armory Conservancy
C/o Thor Industries
230 Park Avenue, Suite 618
New York, N.Y. 10169

Dear Mr. Thompson:

Anne Rosenzweig and Night Sky Restaurants are pleased to submit our bid in response to your Request for Proposals for restaurant and catering services at the Seventh Regiment Armory. We are confident that our model, in which the restaurant and banquet operations are combined into a single entity with both fine dining and banquet space experience, will be an effective way to provide fabulous food to visitors at the Armory.

We look forward to discussions about the details of our proposal and welcome any questions you might have concerning our experience and our commitment to this project.

Yours sincerely,

/s/ DAVID EMIL

David Emil
for Night Sky Restaurants and
Anne Rosenzweig

cc: Anne Rosenzweig

EXHIBIT I

[LETTERHEAD OF JOSEPH BAUM &
MICHAEL WHITEMAN CO., INC.]

October 4, 2000

Mr. Wade Thompson
Chairman
Seventh Regiment Armory Conservancy
C/O Thor Industries
230 Park Avenue, Suite 618
New York, NY 10169

Dear Mr. Thompson:

Joseph Baum & Michael Whiteman Co. and Tentation Potel & Chabot Caterers were pleased to submit a bid in response to your request for proposals for restaurant and catering services at the Seventh Regiment Armory. We look forward to further discussions about the range and excellence of the food services that we can provide.

Yours sincerely,

/s/ MICHAEL J. WHITEMAN

Michael J. Whiteman

EXHIBIT J

[LETTERHEAD OF RESTAURANT ASSOCIATES]

October 4, 2000

Mr. Wade Thompson
Chairman
Seventh Regiment Armory Conservancy
C/O Thor Industries
230 Park Avenue, Suite 618
New York, NY 10169

Dear Mr. Thompson:

Restaurant Associates is very pleased to submit a bid in response to your request for proposal for a restaurant and catering services at the Seventh Regiment Armory. We are looking forward to discussing the opportunities and partnership further.

Restaurant Associates has a great deal of experience in cultural centers, museums, and performing arts centers. We would truly appreciate the opportunity to apply this expertise to the armory and work to surpass all your food service expectations.

Sincerely,

/s/ Ed Sirhal

Ed Sirhal
Senior Vice President Development

EXHIBIT K

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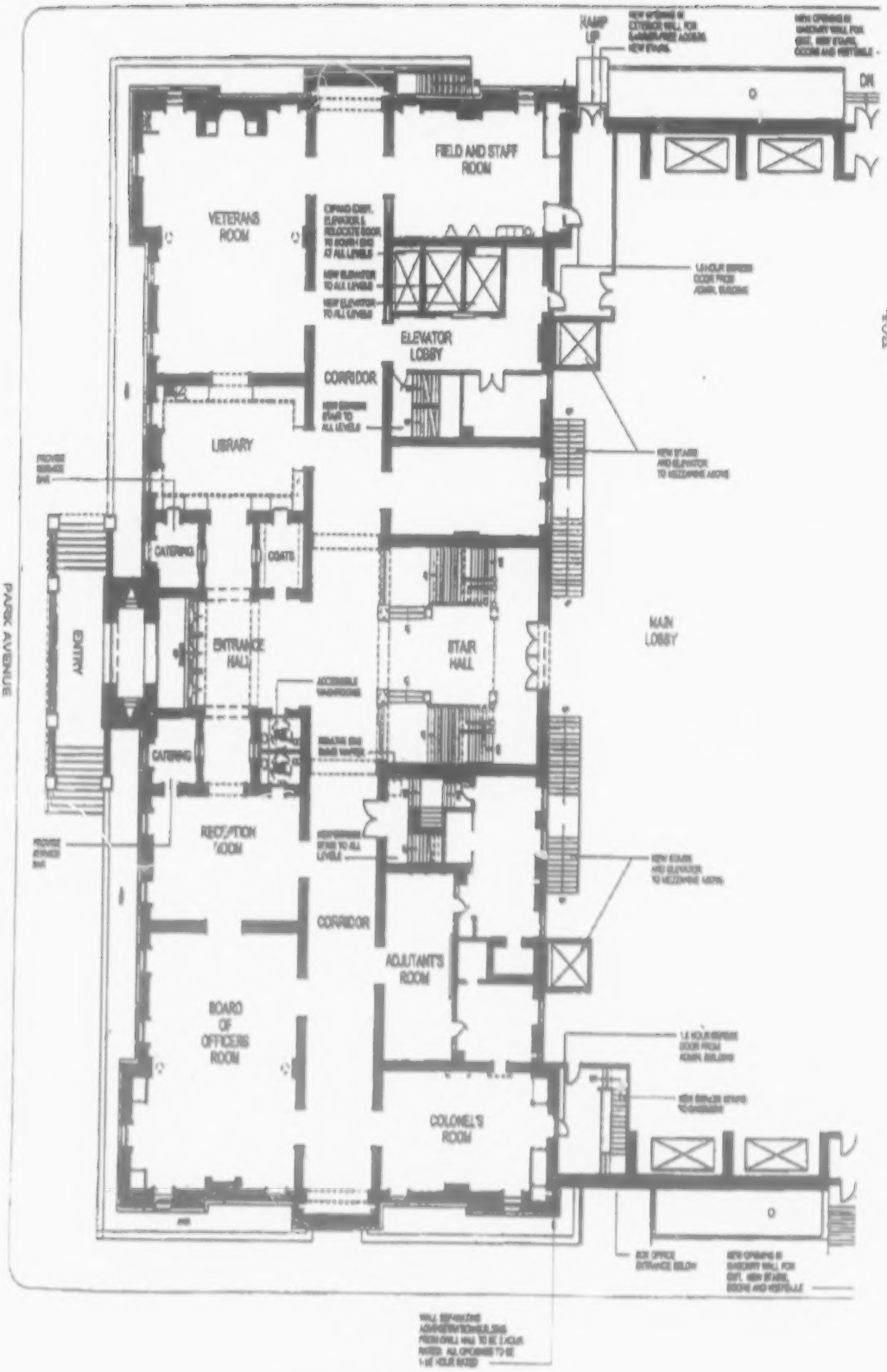

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EXHIBIT G

CORRIDOR
A
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M
OFFICE
DUST
RECEPTION
LOBBY
MEN
WOMEN

(Conservancy lease, exempt from Appendix 2A)

Floor	Use	Location	SF	Capacity/Specs/Notes (T= toilet, U= urinal)
First Floor				
Administration Building First Floor				
	Restaurant			
	Dining Room	Board of Officers	1,780	capacity: 88 seated
	Dining Room	Reception Room	850	capacity: 36 seated
	Dining Room	Colonel's Room	920	capacity: 36 seated
	Dining Room	Adjutant's Room	646	capacity: 28 seated
	Bar	South Hallway	1,600	
	Sub-total		5,796	
	Restaurant Back of House and Patron Facilities			
	Kitchen		1,180	
	Ladies Room (ADA)		120	1T
	Mens Room (ADA)		120	1T
	Cost Check		130	
	Sub-total		1,550	
	Public Rooms			
	Reception Rm	Veterans Room	1,750	capacity: 145 standing
	Reception Rm	Library	845	capacity: 70 standing
	Reception Rm	Field and Staff	920	capacity: 76 standing
	Sub-total		3,515	
	Public Rooms Back of House			
	Prep Room	Equipment Room	529	
	Storage		200	
	Sub-total		729	
	Patron Facilities			
	Lobby		1,610	
	Box office storage	Inner Committee	200	
	Elevator & lobby	Outer Committee	160	
	Sub-total		1,970	
	Other			
	Mechanical		50	
	Stairs	North End	195	
		South End	250	
	Elevator		285	
	Sub-Total		780	
	TOTAL First Floor NSF	Administration Building	14,340	
	TOTAL Actual GSF	Administration Building	18,726	

EXHIBIT H

Floor	Use	Location	SF	Capacity/Specs/Notes (T= toilet, U= urinal)
Second Floor - Administration Building				
	Corporate Entertaining			
	Corporate Rms	12 Company Rms	10,094	capacity: 30 sq. standing
	Food prep		590	
	Sub-total		10,684	
	Patron Facilities			
	Men's Room		210	2T/3U
	Ladies Room		400	6T
	Lobby	Hall	3,671	capacity: 306 standing
	Sub-total		4,281	
	Other			
	Mechanical		114	
	Stairs	North End	195	
		South End	220	
	Elevator		200	
	Sub-total		729	
	TOTAL Second Floor NSF	Administration Building	15,694	
	TOTAL Actual GSF	Administration Building	18,726	
Second Mezzanine - Administration Building				
	Gallery Offices		1,015	
	Gallery Storage		750	
	Mechanical		103	
	Stairs		421	
	Elevator		200	
	TOTAL Second Mezzanine	Administration Building	2,489	
	TOTAL Actual GSF	Administration Building	2,742	
Third Floor - Administration Building				
	Galleries		10,080	
	Offices/Storage/Other		3,594	
	Concessions		550	
	Ladies Room		215	6T
	Mens Room		217	2T/3U
	Lounge		400	
	Coat Room		60	
	Lobby	Hall	165	
	Mechanical		109	
	Stairs	North End	196	
		South End	231	
	Elevator		200	
	TOTAL 3rd Floor NSF	Administration Building	16,017	
	TOTAL Actual GSF	Administration Building	18,726	

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Supreme Court, U.S.
FILED
MAY 25 2010
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No. 09-930

IN THE

Supreme Court of the United States

KENYON B. FITZGERALD, *ET AL.*,

Petitioners,

v.

WADE F.B. THOMPSON, *ET AL.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF IN OPPOSITION

AIDAN SYNNOTT
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Counsel for the Private-Party Respondents

QUESTIONS PRESENTED

When an armory building in New York City fell into disrepair, the New York Legislature enacted a statute authorizing the building to be leased to a non-profit organization. Petitioners are veterans who claim that the statute effected a taking and unlawfully denied them building access. The district court dismissed petitioners' claims for lack of standing, and the Second Circuit affirmed. The questions presented are:

1. Whether petitioners have standing to assert a taking when petitioners have no ownership interest in the armory.

2. Whether petitioners' claimed denial-of-access injury satisfies the requirement that, to be a proper predicate for standing, injury must be "actual or imminent, not conjectural or hypothetical" when the challenged statute requires the organization managing the building to grant reasonable access to veterans on request, and when petitioners concededly failed to request access.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of this Court, the undersigned private-party respondents (the Seventh Regiment Armory Conservancy, Inc., and certain of its officers, directors, and employees: Elihu Rose, Stephen Lash, Arie L. Kopelman, Edward Klein, Rebecca Robertson, Kirsten Reoch, and Wade F.B. Thompson[1]) state as follows:

Respondent the Seventh Regiment Armory Conservancy, Inc., a not-for-profit organization, has no parent corporation and no publicly-held corporation owns 10 percent or more of its stock.

---

[1] Although Mr. Thompson was a party to the proceedings below, he has since passed away. We believe that, because Mr. Thompson was sued solely in his capacity as a board member of the Conservancy, he is no longer a party.

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STATUTE

2004 N.Y. Laws Ch. 482 2

STATEMENT OF THE CASE

Petitioners challenge a state statute that authorized an armory to be leased to a non-profit organization. The Second Circuit, affirming the district court, correctly concluded that petitioners lack standing to press their challenge because they neither own the armory nor requested access to it. Those holdings do not conflict with precedent of any other court. Because this case involves only fact-bound application of unchallenged and correctly stated legal principles, it presents no issue warranting review by this Court.

1. On Manhattan's Upper East Side, at Park Avenue and 67th Street, stands the Seventh Regiment Armory. Pet. App. 3a. Built between 1877 and 1881, the Armory includes a vast drill hall that was an engineering marvel when it was built, as well as a number of meeting rooms that were ornately decorated by some of the finest artists and craftsmen of the day. The building is included in federal, state, and local landmark registers. Pet. 9; Pet. App. 9a, 26a.

Since its construction, the Armory has always been publicly owned and controlled. Pet. App. 31a-32a. The land under the Armory was and is owned by the City of New York. Pet. App. 9a, 17a, 28a. The land was leased to the Seventh Regiment, a National Guard unit that has always been an arm of the State of New York. Pet. App. 9a, 17a.

The Armory continues to be used as an administrative center and staging ground for the National Guard. Pet. 10. Over the years, the State also permitted other public uses. For some time, part of the building has been used as a homeless shelter. Pet.

App. 27a. In addition, the drill hall has long been used for exhibits and artistic performances. Pet. 10, 11; Pet. App. 26a-27a.

In recent decades, however, the building fell into a regrettable state of disrepair. Pet. App. 10a, 27a. The State estimated that necessary rehabilitation would cost millions of dollars. Pet. App. 27a. Given budgetary constraints, the State was unable to provide public funding and ultimately concluded that funding should be sought instead from private sources. Pet. App. 27a-29a. Accordingly, the State invited private proposals to rehabilitate the building while maintaining its traditional uses. Pet. App. 10a, 27a. In response, the Seventh Regiment Armory Conservancy, Inc. ("Conservancy"), a nonprofit organization, submitted a proposal to rehabilitate the building and expand its function as a center for the performing and visual arts. The State decided to accept the Conservancy's proposal. Pet. App. 11a.

The State implemented the proposal by enacting a statute authorizing lease of the building to the Conservancy. 2004 N.Y. Laws Ch. 482 (reprinted at Pet. App. 26a-36a). The statute allowed the Conservancy to use the building for cultural purposes, on the condition that any proceeds must be devoted to the building's rehabilitation. Pet. App. 34a-35a. The statute further provided that the Conservancy must allow the building to be used for its traditional purposes. Pet. App. 33a-35a. And the statute provides: "On application of [veterans' associations], the lessee . . . shall provide a proper and convenient room or rooms or other appropriate space in the armory where such [association] may hold regular and special meetings and organizational social events of

a private nature, without the payment of any charge or expenses therefor, provided that such use does not interfere with the use by the lessee . . . ." Pet. App. 33a.

2. Almost three years after the statute's enactment, petitioners (three individual veterans and one veterans' organization) challenged the statute in federal district court. Pet. App. 11a. The complaint named as defendants various state officials as well as the undersigned private-party respondents (the Conservancy and certain of its officials). The complaint requested a declaration that the statute violated petitioners' constitutional rights and an injunction against the statute's implementation.

The complaint alleged that the statute violated the Takings Clause and interfered with petitioners' access to the Armory in violation of petitioners' First Amendment, due process, and equal protection rights. The complaint also asserted that the Armory should be used to establish a museum dedicated to the Seventh Regiment, and that the failure to establish such a museum (at public expense) likewise violated petitioners' rights under the First Amendment.

Respondents moved to dismiss the complaint on numerous grounds. *See* Pet. App. 13a. With respect to the claim that the statute took property from the Seventh Regiment, respondents argued (among other things) that the Seventh Regiment is an arm of the State of New York, and as such is not a private entity that is capable of suffering a taking — much less at its own hand. Even if the Seventh Regiment could assert any kind of takings claim, respondents argued, that claim could not be asserted

by petitioners, who are not officers of the Seventh Regiment or otherwise authorized to act on the Regiment's behalf.

As for the claim about petitioners' own access to the Armory, respondents argued (among other things) that nothing in the challenged statute denies veterans access to the Armory — to the contrary, the statute specifically provides that, "[o]n application of [veterans' associations]," the Conservancy "shall" make available "a proper and convenient room or rooms or other appropriate space in the armory." Pet. App. 33a. And, respondents argued, the complaint does not (because it cannot) allege that petitioners sought access from the Conservancy, much less that such access was denied. Thus, respondents argued, any claim about possible denial of access was speculative.

The district court granted the motion to dismiss. With respect to the takings claim, the district court noted that the Armory has historically been owned and controlled by the Seventh Regiment. Pet. App. 16a-17a. Petitioners, it found, "are *not* representatives of the Regiment and thus have no property interest in the Armory." Pet. App. 17a (emphasis in original). "Because only those with cognizable property interests have standing to bring takings claims," the district court concluded, petitioners "lack standing." Pet. App. 22a.

With respect to the denial-of-access claim, the district court noted that, "by the express terms of [the statute], veterans' groups may have access to the Armory on application to the Conservancy." Pet. App. 15a. As the district court explained, the statute amended prior law only in that it "shifted the

responsibility of granting access to the Armory from the officer in charge of the Armory to the lessee of the Armory, the Conservancy." Pet. App. 15a-16a. And, the court noted, "[t]he Complaint does not allege that the Conservancy has taken any steps affirmatively to restrict applications by veterans groups"; nor does it allege that petitioners "have made any such application to access the Armory." Pet. App. 16a. Accordingly, the district court ruled, petitioners "are unable to demonstrate more than an injury that is merely speculative," which is not sufficient to support standing. Pet. App. 16a.

The Second Circuit affirmed by unpublished summary order. With respect to the takings claim, the court stated that "'[o]nly the owner of an interest in property at the time of the alleged taking has standing to assert that a taking has occurred.'" Pet. App. 4a (quoting *United States Olympic Committee v. Intelicense Corp.*, 737 F.2d 263, 268 (2d Cir. 1984)). The court noted that petitioners "allege no official connection between [petitioners] and the Seventh Regiment of the National Guard." Pet. App. 5a. "Therefore," the court concluded, petitioners "have no standing to bring a takings claim." *Id.*

As for the claim about petitioners' own access to the Armory, the court of appeals noted that petitioners did not argue that the statute violates their rights "on its face," and likewise did not allege that the statute "has been applied to violate" their rights. Pet. App. 5a. As the court noted, the statute "changes the access procedure to the Armory only in that appellants must now submit their application for access to a different person," and "Appellants did not allege that they have applied for and been denied access." Pet. App. 5a. "At present," the court

accordingly concluded, "any injury is hypothetical." Pet. App. 6a.[2]

The undersigned private-party respondents initially waived a response to the petition. On March 30, 2010, this Court requested a response. The Court later extended the time for filing a response to and including May 28, 2010.

REASONS TO DENY THE WRIT

I. THE PETITION PRESENTS NO TAKINGS ISSUE THAT WARRANTS REVIEW.

In affirming the dismissal of petitioners' takings claim, the Second Circuit was entirely correct. As the court of appeals noted, "[o]nly the owner of an interest in property . . . has standing to assert that a taking has occurred." Pet. App. 4a (internal quotation marks omitted). That view is consistent with the precedent of this Court and other courts that have considered the issue. *See, e.g., Andrus v. Allard*, 444 U.S. 51, 64 n.21 (1979) ("[T]here is no standing to assert a takings claim by those who are merely employed in selling artifacts owned by others."); *Air Pegasus of D.C., Inc. v. United States*, 424 F.3d 1206, 1219 (Fed. Cir. 2005) ("Air Pegasus appears to assert a claim based on a perceived taking of property owned by other parties. The Fifth Amendment does not provide a remedy for such a derivative claim."); *United States Olympic Committee v. Intelicense Corp.*, 737 F.2d 263, 268 (2d Cir. 1984) ("Only the owner of an interest in property at

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[2] The court of appeals also rejected petitioners' museum-related claim on the merits, determining that petitioners "have not shown any right to install a museum in the Armory." Pet. App. 6a.

the time of the alleged taking has standing to assert that a taking has occurred."); *Heirs of Burat v. Board of Levee Commr's of the Orleans Levee Dist.*, 496 F.2d 1336, 1341 (5th Cir. 1974) ("The Burats do not have standing to contest the expropriation of United States owned land, nor do they have standing to contest the taking of privately owned land from other owners."); *ConocoPhillips Co. v. Henry*, 520 F. Supp. 2d 1282, 1298 (N.D. Okla. 2007) ("The Court is not aware of any Takings Clause case in which a court invalidated a law based on its impact on property owners that were not parties to the litigation."), *rev'd on other grounds*, *Ramsey Winch Inc. v. Henry*, 555 F.3d 1199 (10th Cir. 2009).

The court of appeals was further correct in ruling that, as a factual matter, the complaint did not allege that petitioners either are the Seventh Regiment or are authorized to act on the Seventh Regiment's behalf. Nor do petitioners dispute this characterization of the facts in their petition. Rather, without citation to the record, petitioners make an "offer of proof" that two of the petitioners were officers and members of various organizations that used the Armory *other* than the Seventh Regiment itself, including the Seventh Regiment Rifle Club and the Veterans of the Seventh Regiment. Pet. 17. These are new allegations, which are not in the complaint and thus not properly before this Court. In addition, they simply confirm that petitioners have no right to act on the Seventh Regiment's behalf.

Petitioners do not contend that the Second Circuit's decision conflicts with the decision of any other court of appeals. Petitioners also do not contend that the petition should be held pending the

decision in any other case on this Court's plenary docket.[3] Rather, petitioners for the most part simply repeat their merits arguments that the Armory constitutes private property, that the statute effected a taking, and that the taking was for a private rather than a public use. Petitioners fail, however, to take meaningful issue with the ground on which the court of appeals rested its ruling: that petitioners are not the Armory's owner and are not authorized to act on the owner's behalf. In light of that holding, petitioners' merits arguments are beside the point.

The closest petitioners come to challenging the court of appeals' threshold ruling is when they argue that the court of appeals took an overly narrow view of ownership. Pet. 26-30. According to petitioners, "retired members" of the Seventh Regiment as well as "those who contribute 'sweat equity' into the Armory" have a sufficient ownership stake to be entitled to assert takings claims on the Seventh Regiment's behalf. Pet. 26. But petitioners correctly acknowledge that their claim is "novel," Pet. 13: they cite no support for it, and we know of none. Nor does petitioners' view have common sense to commend it: it would vastly expand the universe of parties who must be compensated when government exercises its power of eminent domain and it would greatly complicate governmental efforts to renovate or dispose of government property.

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[3] There is no cause to hold the petition pending a decision in *Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protection*, No. 08-1151 (filed Mar. 13, 2009). The issue in that case is whether a taking can be effected by a judicial decision. Here, there is no claim of any taking by judicial decision.

II. THE PETITION PRESENTS NO DENIAL-OF-ACCESS ISSUE THAT WARRANTS REVIEW.

Just as the court of appeals was correct in holding that petitioners lack standing to assert a takings claim, so the court of appeals was correct in holding that petitioners lack standing to complain of a denial of access. To have standing, a plaintiff must point to an invasion of a legally protected interest that is "actual or imminent, not conjectural or hypothetical." *Bennett v. Spear*, 520 U.S. 154, 167 (1997). As a result, a plaintiff lacks standing to challenge denial of a benefit unless he shows either that he applied for the benefit or that application would have been futile. *See, e.g., Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 167 (1972) ("appellee was not injured by Moose Lodge's membership policy since he never sought to become a member"); *Schutz v. Thorne*, 415 F.3d 1128, 1134-35 (10th Cir. 2005) ("[Plaintiff] had not yet applied for [hunting] licenses and established that the [challenged statute] in fact limited his hunting options. Standing is not conferred by 'conjecture' or 'speculation' about future hunts."); *Madsen v. Boise State Univ.*, 976 F.2d 1219, 1220 (9th Cir. 1992) (*per curiam*) ("There is a long line of cases . . . that hold that a plaintiff lacks standing to challenge a rule or policy to which he has not submitted himself by actually applying for the desired benefit."); *Albuquerque Indian Rights v. Lujan*, 930 F.2d 49, 55 (D.C. Cir. 1991) (association complaining of agency's "failure to apply . . . hiring preference" lacked standing because it "failed to assert that any of its members actually applied for or otherwise sought to fill vacant . . . positions"); *ICC v. Appleyard*, 513 F.2d 575, 577 (4th Cir. 1979) ("Until

[plaintiff] has shown that he cannot obtain a permit under the existing regulations, he has suffered no legally cognizable injury from this injunction.").

As the court of appeals correctly ruled, petitioners do not and cannot argue that the challenged statute violates their rights "on its face," Pet. App. 6a: the statute by its terms requires the Conservancy to provide veterans' groups "proper and convenient" access upon request, Pet. App. 33a. The court of appeals also correctly determined that petitioners' complaint did not "allege that [petitioners] have applied for and been denied access." Pet. App. 6a. On these facts, the court of appeals correctly held that petitioners' "injury is hypothetical," and that their access claim therefore is not justiciable. Pet. App. 6a.

Petitioners again do not (because they cannot) argue that this ruling conflicts with the ruling of any other court of appeals. Nor do petitioners argue that the court of appeals' ruling implicates a question presented in any other case on this Court's plenary docket. Rather, petitioners again devote the bulk of their petition to arguing that they have statutory and constitutional rights to assemble in the Armory, including a right to establish a museum there at public expense.[4] Those assertions are baseless: although petitioners unquestionably have a First Amendment right to speak about their experi-

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[4] *See, e.g.*, Pet. 33 ("The obvious source of funding for planning, installing and operating a first-class museum on America's citizen-soldiers in the Seventh Regiment Armory is out of the rental income the Armory receives from the annual antique art and antiquarian book shows held in the Armory's Drill Hall.").

ences and to establish a museum memorializing them, they have no right to occupy property that has been leased to others, much less at public expense.

More importantly, petitioners do not meaningfully challenge the court of appeals' threshold determination that, absent any allegation that access has been requested and denied, any denial-of-access injury is hypothetical. The petition states that the statute "closed the Armory to veterans," Pet. 24, that petitioners have been "*de facto* denied access," Pet. 37, and that they have been "effectively excluded," Pet. 39. But petitioners nowhere take issue with the court of appeals' determination that petitioners' complaint failed to "allege that [petitioners] have applied for and been denied access." Pet. App. 6a. Petitioners cannot pursue a claim for denial of access they have not sought.

Petitioners appear to argue that they can have standing even without requesting access. Citing *Friends of the Earth, Inc. v. Laidlaw Environmental Services, Inc.*, 528 U.S. 167 (1999), petitioners argue that they are being denied "enjoyment of the Armory's aesthetic and recreational resources," which they say is "not unlike the aesthetic and recreational rights of bird-watchers and animal welfare activists in environmental cases." Pet. 30; *see* Pet. 13, 39 (same).

But even in environmental cases (which implicate considerations quite different from those at issue here), plaintiffs cannot establish standing merely by claiming to care about the environment — they must assert that they have a present intent to avail themselves of environmental enjoyment in a particular location affected by a measure sought to be

blocked. *See, e.g., Summers v. Earth Island Inst.*, 129 S. Ct. 1142, 1150 (2009) (requiring a "firm intention to visit . . . locations" affected by challenged measure); *Friends of the Earth*, 528 U.S. at 181-82 (plaintiffs had established standing by asserting that they sought to visit a particular location but had been rebuffed by the pollution that they sought to remedy); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 564 (1992) (plaintiffs could not establish standing by asserting that they intended to return "some day" to affected area without asserting "concrete plans").

To be sure, plaintiffs in environmental cases generally need not allege that they filed an application for access to a particular park or forest. But that is so only because most parks and forests are open to the general public without the need for any prior application. *Friends of the Earth* and other environmental cases recognize, however, that a plaintiff complaining of environmental harm to a particular location must assert concrete intentions to visit that location. That recognition only lends support to the proposition that a plaintiff seeking access to a location that provides desired access on application must assert that access has been requested and denied.

* * *

For their military service to the Nation, petitioners deserve respect. But petitioners have no right to override the decision of elected representatives of the People of the State of New York to implement an effective and efficient plan to save a priceless State resource while preserving its military character. That legislative judgment also deserves respect in

federal court. And, as the Second Circuit correctly determined, petitioners' legal challenges to that judgment founder on settled principles of justiciability. That determination does not give rise to issues that deserve this Court's further attention.

CONCLUSION

The petition should be denied.

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No. 09-930

JUN 4 - 2010

IN THE

Supreme Court of the United States

KENYON B. FITZGERALD JR., PETER SCOVILLE WELLS, SIDNEY SILLER, DISABLED AMERICAN VETERANS DEPARTMENT OF NEW YORK,

Petitioners,

—against—

WADE F.B. THOMPSON, ELIHU ROSE, ARIE L. KOPELMAN, STEPHEN LASH, EDWARD KLEIN, REBECCA ROBERTSON, KIRSTEN REOCH, CHARLES GARGANO, WILLIAM SHERMAN, CAROL BERENS, JOHN DOE, MARY ROE, SEVENTH REGIMENT ARMORY CONSERVANCY, INC.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONERS' REPLY BRIEF

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Petitioners' Reply Brief

The Conservancy Respondents' Brief in Opposition is marred by a number of inaccurate statements of material facts and omissions of relevant law. This reply brief is respectfully submitted to correct those errors.

MATERIAL FACTUAL ERRORS IN RESPONDENTS' STATEMENT OF THE CASE

I. *Ownership and Control of Armory.* Respondents state on page 1 of their brief that "the Armory has always been publicly owned and controlled." That assertion is incorrect and comes directly from the challenged state legislation drafted by the Conservancy's private lawyers to obtain favored treatment for their client. The Armory was actually built by private funds and at the time of the disputed state legislation was owned by the Trustees of the Armory, a non-governmental body holding the land and building for the public purposes of the Seventh Regiment. (Appendix p 10a)

II. *Volunteer Militia Tradition.* The Seventh Regiment has not "always been an arm of the State of New York," as incorrectly claimed by the Conservancy respondents (Resp. Br. p 1). The Regiment was organized in 1824 as an independent private volunteer militia organization (Appendix 9a-10a). In recent times its military functions have been subject to state supervision, but the Regiment also continues to carry on its historic character and proud tradition as a privately organized volunteer body of citizen soldiers.

III. *Armory Funding of Conservancy Programming.* The challenged state legislation does not restrict the Conservancy's use of Armory rental income to "the building's rehabilitation" as claimed in Respondent's brief (Resp. Br. p 2). The legislation explicitly allows the Conservancy to use those proceeds for "programming" and for "activities of the lessee or subsequent lessee with respect thereto." Legislation § 39(b). (Appendix 35a). [This allocation of the Armory's rental income to the private Conservancy group after it was denied for many years to the Seventh Regiment for building maintenance is one of Petitioners' objections to the challenged state legislation.]

IV. *Restrictions on Veterans' Access.* Respondents' description (Resp. Br. pp 2-3) of the restriction imposed in the state legislation on allowing veterans associations to hold meetings in the Armory wholly omits the most important limitation, which makes such applications futile. The condition for use by veterans groups is not simply "provided that such use does not interfere with the use by the lessee. . ." but also includes the following crucial limitation (omitted from Respondents' brief): "provided that such use does not interfere with the use by the lessee or the manager pursuant to the terms of the management agreement, including any use by third parties contracted for under subparagraph (ii) of this paragraph." (Legislation § 3(i) (Emphasis added.)) (Appendix 33a).

Subparagraph (ii) of the disputed state legislation allows commercial operators to use the Veterans Room and other historic Regimental rooms for full-time restaurants, cocktail lounges and corporate reception areas—automatically blocking

any veterans' group from using those key Armory spaces for meetings, programs or social gatherings. This *proviso* is what makes any veterans' group application for use of these spaces futile. The only space actually available for their use are the two small offices on the top floor of the Armory —not the Veterans Room, any of the Regimental rooms, or any of the Company rooms on the main and second floors (See Appendix, 40a and 42a [floor plans and lease]).

MATERIAL ERRORS OF LAW IN RESPONDENTS' LEGAL ARGUMENT

I. Property Interest

The Conservancy Respondents urge the narrowest possible interpretation of what is a "property interest" to provide Article III standing. Their argument demonstrates the need for this Court to settle the meaning of "property interest" to clarify standing to challenge an allegedly unconstitutional taking.

Petitioners argue that "property interest" should be broadly defined for standing purposes—in this case also including property use and a "recreational right" as well as a "liberty interest." (Petition, p 30)

The Petitioners' property interest in the Armory is rooted in multiple associations and involvement with the Seventh Regiment, affiliated groups, and individual veteran's regular use of the Armory itself[1].

[1] Respondents' brief asserts that the activities of Fitzgerald and Wells as officers of Seventh Regiment support

Respondents' only Supreme Court authority offered to support a narrow view of "property interest" is *Andrus v. Allard*, 444 U.S. 51, 64 n21 (1979) (Resp. Br. p 6).

Andrus v. Allard involved a dispute over the right to sell eagle feathers that were lawfully in Plaintiffs' possession. Respondents have selectively quoted three lines of dicta from the middle of a footnote in that case to support their assertion that Petitioners do not have legally cognizable standing. Respondents do not disclose that the Court actually upheld Article III standing for the Plaintiffs in that case. The full text of the cited footnote reads as follows:

> 21. Although this argument appears to have been cast in the District Court in terms of economic substantive due process, before this Court appellees have used the terminology of the Takings Clause.
>
> The Secretary has raised the question of appellees' standing to assert a takings claim with respect to their artifacts. He asserts that appellees have not clearly stated that they acquired their property interest in the bird artifacts before the sales ban came into force.

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organizations are "new allegations, which are not in the complaint." (Resp. Br. p 7) However, the District Court itself recognized that the complaint asserts that Fitzgerald and Wells have a property interest in the Armory "as representatives of its successor organizations, including its Historical Society." (Appendix 17a). The specific details of Petitioners' activities as representatives of these successor organizations were set forth in Petitioners' brief on appeal as an "offer of proof" to help that court better understand the nature of these related regimental organizations (See Appellants' Second Circuit brief at page 26, footnote 4).

> If they have not, the Secretary argues, then the "value of any artifacts purchased by appellees *after* the effective date of the Act had already been diminished by the applicability of the Act." Brief for Appellants 30. This contention is misplaced. Even assuming that appellees have not sufficiently alleged pre-effectiveness possession, they have standing to urge their constitutional claim. Because the regulation they challenge restricts their ability to dispose of their property, appellees have a personal, concrete, live interest in the controversy. See *Baker v. Carr*, 369 U.S. 186, 204, 82 S.Ct. 691, 703, 7 L.Ed.2d 663 (1962). The timing of the acquisition of the artifacts is relevant to a takings analysis of appellees' investment-backed expectations, but it does not erect a jurisdictional obstacle at the threshold. Of course, there is no standing to assert a takings claim by those who are merely employed in selling artifacts owned by others. All appellees, however, may face future criminal prosecutions for violations of the statutes, and that, of itself, suffices to give them standing to litigate their interest in the construction of the statutes.
>
> (444 U.S. 51 at fn21) (Emphasis in original.)

Petitioners here do not claim they face any risk of criminal prosecution for exercising their property interests, but they do stress that property interests come in many shapes and forms—including their interest in use of the Armory for Seventh Regiment-related activities prior to the passage of the state legislation, and that the state legislation in this case took away their prior right to use the

Armory. Such use included exercise of responsibilities as officers of Regiment-affiliated organizations; active military service; planning for a military history museum in the Armory; participation in veterans' dinners and gatherings in the Veterans Room; plus the liberty interests and association rights of meeting with other veteran colleagues on the premises; as well as recreational and aesthetic enjoyment of the building's landmarked interior spaces—now closed to them to make way for high-priced civilian dinner parties, receptions, and cocktail gatherings. Depriving them of their prior uses of the property created a personal, concrete, live interest in the controversy.

II. Right of Access

Respondents assert that Petitioners "do not and cannot argue that the challenged statute violates their rights 'on its face.'" (Resp. Br. p 10) That assertion is incorrect—the precise basis for Petitioners' claim that they have been denied their statutory right of access to the Armory is that the challenged statute on its face excludes veterans from all spaces to be used by third parties "contracted for under subparagraph (ii) of this paragraph"—i.e., for restaurant, cocktails and receptions. (See discussion above.) The statute effects a lock-out of veterans organizations from the historic Regimental and Company rooms on the Armory's main and second floors, making any application for their use by veterans groups without charge "futile."

Respondents cite and quote *ICC v. Appleyard* in support of their claim that Petitioners have suffered no injury since they have not actually

applied for a permit and been turned down (*ICC v. Appleyard*, 513 F.2d 575, 577 (4th Cir. 1979) (Resp. Br. 9-10)).

However, *Appleyard* goes further than that and holds that an alternative ground for suit is when a permit application would be "futile":

> Appleyard concedes that Congress may require permits for interstate motor carriers. Since he does not attack the statute as unconstitutional on its face, we cannot presume that a request for a permit would be futile. Until he has shown that he cannot obtain a permit under the existing regulations, he has suffered no legally cognizable injury from this injunction.
>
> (513 F.2d 575, at 577)

Here the futility is created by the statute itself in closing the doors to the Armory's historic spaces to all veterans in order to convert the spaces to commercial restaurant use.

CONCLUSION

This Court should make clear that, properly applied, the relevant cases on Article III standing fully support the standing of Petitioners to be heard on the constitutionality of the State's transfer of the National Historic Landmark Seventh Regiment Armory from use by military veterans and veterans organizations to a pre-selected private organization.

This case is about constitutional access to justice, which should be deprived only on compelling policy grounds and not lightly denied to the citizen-soldiers who have risked their lives fighting to preserve that very constitutional value for all citizens.

Respectfully submitted,

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No. 09-930

In the
Supreme Court of the United States

KENYON B. FITZGERALD, JR., PETER SCOVILLE WELLS, SIDNEY SILLER, DISABLED AMERICAN VETERANS DEPARTMENT OF NEW YORK, INC.,

Petitioners,

– v –

WADE F. B. THOMPSON, ELIHU ROSE, ARIE L. KOPELMAN, STEPHEN LASH, EDWARD KLEIN, REBECCA ROBERTSON, KIRSTEN REOCH, CHARLES GARGANO, WILLIAM SHERMAN, CAROL BERGENS, JOHN DOE, MARY ROE, SEVENTH REGIMENT ARMORY CONSERVANCY, INC.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF OF AN *AMICUS CURIAE* IN SUPPORT OF THE POSITION OF THE PETITIONERS BEFORE THE COURT'S CONSIDERATION OF A PETITION FOR A WRIT OF CERTIORARI

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Proposed Amicus Curiae

Motion for Leave to File an *Amicus Curiae* Brief Out of Time

Pursuant to Rules 21 and 37 of this Court, The American Legion, Department of New York, moves this Court for leave to file the annexed brief as an *amicus curiae* in this matter out of time

The *Amicus Curiae,* The American Legion, Department of New York did not know of the existence of this matter or of the petition for *certiorari* or ask counsel of record to write the brief until late April of this year and could not have filed the brief in March.

As more fully explained in the annexed motion for leave to file the brief before consideration of the petition, the brief will bring to the attention of this Court relevant matter not already brought to its attention by the parties and which bears directly on the question of whether *certiorari* should be granted.

Wherefore The American Legion, Department of New York requests that the Court allow it to file the annexed brief as an *amicus curiae* out of time.

June 1, 2010

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Motion for Leave to Submit a Brief of an *Amicus Curiae* in Support of the Position of the Petitioner before the Court's Consideration of a Petition for a Writ of Certiorari.

Pursuant to Rule 37(2) of this Court, The American Legion, Department of New York, moves this Court for leave to file the annexed brief as an *amicus curiae* in this matter prior to consideration by this Court of the Petition for Certiorari.

The Petitioner and the Respondents Seventh Regiment Conservancy, Inc., Stephen Lash, Arie L. Kopelman, Edward Klein, Rebecca Robertson, Kirsten Reoch, and Wade F.B. Thompson have consented to the filing of the brief. No other respondent has.

The order of the court of appeals approves the termination of the rights of posts of veterans' organizations to meet in the Seventh Regiment of New York's armory. The *amicus curiae*, The American Legion, Department of New York is a department of The American Legion. the world's largest organization of war veterans. It consists of about 900 posts, more posts than those of any other veterans' organization in New York state. It, therefore, represents more veterans' posts adversely affected by the statute challenged in this case than anyone else.

The annexed brief will bring to the attention of this Court relevant matter not already brought to its attention by the parties and which bears directly on the question of whether *certiorari* should be granted.

This brief discuses the unsettling effect on previously settled law that the order of the court of appeals has in this case and the encroachment by the legislature on the power and precedents of the judiciary that are sanctioned by the order of the court of appeals. These issues have not been brought to the attention of this Court by the Petition.

Wherefore The American Legion, department of New York requests that the Court allow it to file the annexed brief as an *amicus curiae*.

May 24, 2010

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Questions Presented for Review

1. Do organizations of war veterans have standing to challenge a statute that deprives them of their meeting place?

2. Do organizations of war veterans have a right to challenge a statute that "declares" that the state and not the trustees of a National Guard unit own the lease of an armory and the same statute has the effect of depriving these veterans of the same rights to meet that state law guarantees them in all other armories?

3. Do organizations of war veterans have a right to challenge a statute that changes the terms of their access to one armory so as to deprive them in effect of the use of that armory?

4. May a state constitutionally "declare" by legislation which party owns a specific leasehold?

5. May a state take without due process or compensation the property of a unit of the National Guard?

Corporate Disclosure Statement

The American Legion, Department of New York is one of 55 departments chartered by The American Legion, a corporation created by act of Congress. There are approximately 14,500 American Legion posts in the world. Some, but not all, posts are incorporated. Many of them have subsidiaries. The American Legion, Department of New York is the parent of Empire State American Legion Boys' State, Inc. The American Legion is the parent of many funds, foundations, and trusts created for charitable purposes and all of which have the words "American Legion" in their name.

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The Interest of the *Amicus Curiae*[1]

The *amicus curiae*, The American Legion, Department of New York is one of fifty-five departments of The American Legion. Approximately 900 of the approximately 14,500 American Legion posts make up The American Legion, Department of New York.

The American Legion was created by congressional act, 36 USC 21701-21708, and is the largest organization of war veterans in the world. The American Legion, its departments, and its posts are all exempt from taxation under IRC 501(c)(19). Its posts in New York are benevolent orders under the New York Benevolent Orders Law.

The American Legion, Department of New York has more posts adversely affected by the legislation challenged here than any other veterans' organization. The petitioner, Disabled American Veterans Department of New York is also a department of an organization created by act of Congress, 36 USC 50301-50308.

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[1] The printing and filing of this brief is being paid for entirely by The American Legion, Department of New York. Preparation of the brief was done entirely *pro bono publico* by Charles G. Mills IV, Judge Advocate of The American Legion, Department of New York.

Statement of the Case

This amicus curiae adopts the list of parties, citations of the official and unofficial reports of opinions and orders entered in the case, statement of the basis for jurisdiction in the Supreme Court, statement of constitutional provisions and statutes involved in the case, statement of the case, and jurisdictional statement as set forth in the petition for *certiorari*.

Summary of the Argument

War veterans' organizations have standing to challenge the constitutionality of New York Military Law 180-a. This act demilitarizes over 98 percent of the armory building of a single armory thereby depriving war veterans and their organizations of meeting places they are granted by law in every other armory in the state.

All this was done through a statute deigned to benefit a pre-selected private (even if not for profit) restaurant corporation and was done by legislative usurpation of judicial power and without due process or compensation to the National Guard unit that actually owns the expropriated property.

The legislature accomplished this by improperly nullifying a determination of the New York Court of Appeals that the armory belongs to the Regiment and "declaring" that it belongs to the state.

The court of appeals improperly held that only the property owner can be injured in fact by an unconstitutional taking of property.

The war veterans' organizations are not required to wait until the military character of the armory has been irreparably destroyed, the new restaurant equipped and opened, a restaurant manager appointed, and a procedure for application to meet there adopted and to then make a futile application to meet there which we know cannot be granted, before they can seek judicial vindication of their rights.

Summary of the Statutory Scheme

With the single exception of the Seventh Regiment Armory, all armories in New York State are subject to New York Military Law 183 which establishes the following uses:

1. National Guard units;
2. Cadets;
3. Veterans' Organizations;
4. Civil Air Patrol units;
5. Military organizations;
6. Organizations of descendents of veterans;
7. Historic military commands;
8. Associations created under the Military Law;
9. Government bodies for official use;
10. Others approved by the National Guard officer in charge.

In 2004 Section 180-a was added to the Military Law which replaced Section 183 with respect to the Seventh Regiment Armory. This section "declared" the state to be the lawful successor of the lessee of the armory (by implication depriving the lessee of the benefits of the lease) and "declared": all fixtures in the armory to be the property of the state from the moment they were "deemed" to have been donated to the state as of the moment they were installed.

Section 180-a abolished military and similar use of the armory except for a small part of it (with an emergency exception) and replaced the subordination of use by veterans' associations to the needs of the

National Guard with a subordination to the needs of the lessee or manager of the armory.

The lessee or manager referred to in Section 180-a is a high priced restaurant for whom the legislation was specifically designed.

Former groups using the armory included cadets known as the Knickerbocker Greys (http://www.knickerbockergreys.org/), a number of organizations of descendents of veterans, and the Veteran Corps of Artillery, one of the Historic Military commands defined in Military Law 240-a and expressly authorized to use armories (http://www.allbusiness.com/personalservices/miscellaneous-personal-services/3813552-1.html) The Petitioner DAV and the *amicus curiae* are veterans' organizations authorized to use armories by Military Law 183.

In short the passage of Military Law 180-a demilitarized the Seventh Regiment Armory and placed it off limits to those unable to afford highly expensive restaurants.

I. *Certiorari* Should be Granted.

The main issue in this case is standing to sue under Article III of the Constitution. This issue was addressed by this Court in *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992). One of the requirements set forth in that case is "injury in fact".

The court of appeals in this case has greatly narrowed in meaning of "injury in fact" and unsettled the law that was once settled by *Lujan*. The court of appeals required a legal interest in any property taken by the state in order for there to be an injury in fact. Appendix to Petition 4a-5a.

The injury to veterans and veterans' organizations and groups is quite real. They are deprived of the meeting places they have used for generations, one room of which was specifically built and dedicated for that purpose. This is contrary to New York law governing every other armory in New York State. Their injury is also a direct result of the taking of the leasehold of the regimental trustees by legislative action, without compensation or due process of any kind.

Adding a new requirement of legal title to the requirements of *Lujan* unsettles settled constitutional law.

Another basis on which the complaint was dismissed is that the veterans and veterans' groups lack standing because the lease between the City of New York and the field grade officers of the Regiment, in trust for the Regiment, is a contract between the state and one of its cities and therefore its obligations may be impaired. Appendix to the

Petition 18a. Whether a unit of the National Guard (the "organized militia") is an alter ego of the state, a joint venture of the state and federal; governments, or a person is an unsettled question that requires construction of the Second Amendment.

The district court in this case states, in effect, that the armory is state property because the legislature said so in its 2004 legislation. Appendix to the Petition 17a. This is improper deference by the district court to a clear encroachment by the legislature on the functions of the judiciary. The district court also cited an unpublished trial court opinion, *Dalva v. Pataki* (2006) but that opinion is directly contradicted by *Tobin v. Laguardia*, 276 NY 34, 43 (1937), which is the governing judicial authority on the subject of the ownership of the lease, and it was beyond legislative power to reverse it.

The right to have ones title to property determined by a court, not by a statute is a due process right under the Fourteenth Amendment. Legislative encroachment on the Judiciary was addressed by this Court in 1880. *Kilbourn v. Thompson*, 103 US 168, 198 (1880). This issue is ripe for further consideration.

In addition for all the reasons set forth in the Petition the Court should grant *certiorari*.

II. The Injury-in-Fact to the Veterans' Organizations Was Very Real and Substantial.

The court of appeals below held that the only change in access to the armory by veterans' organization was that they now had to apply to a "different person". Appendix to Petition 5a.

This is a clear misreading of the statue. New York Military Law 183(b) conditions the use of armories by veterans' organizations only by a provision, "provided that such use does not interfere with the members and units of the organized militia stationed in such armory." The new Military Law 180-a(3)(c)(i) limits such use by the provision, "provided that such use does not interfere with the use by the lessee or the manager pursuant to the terms of the management agreement, including any use by third parties contracted for under paragraph (ii) of this paragraph.

Subordination of a veterans' organization's meetings to the weekly meetings of a militia unit and its monthly week-end meetings is insignificant. Subordinating them to the schedule of a restaurant (priced well above the means of most veterans) that serves at least two meals a day seven days a week amounts to a complete exclusion of the veterans' groups from the armory. This was overlooked by the court of appeals but it was crucial to its order.

In order to have standing under Article III the injury-in-fact to the veterans' organizations must be legally protected, concrete, particularized, actual or imminent, not conjectural or hypothetical, casually connected to legislation, and capable of judicial

correction. *Lujan v. Defenders of Wildlife, supra* at 504 US 560.

The legislative demilitarization of over 98 percent of the armory building concretely, particularly and imminently deprived the veterans' organization of their right to meet in the armory and this can be corrected by this action.

The court of appeals, however, held that this right is hypothetical because the organizations did not apply to the restaurant manager for meeting space and get turned down. What this amounts to is a holding that the veterans' organizations must wait until the demilitarization of the armory is complete, the restaurant is furnished and opened, and a manager appointed and then make an application to this new manager that everyone knows will be denied.

The law does not require clearly futile acts. This is particularly true when the requirement of such useless acts works to delay the vindication of constitutional rights. *Marino v. Regan, Warden,* 332 U.S. 561 (1947), concurring opinion.

The vindication of the constitutional rights of the petitioners and veterans' associations similarly situated should not be delayed until the military character of the rooms has been irreparably destroyed, expensive restaurants installed, and a procedure for scheduling private parties created, and a manager to whom the veterans' organizations can apply appointed.

III. The Challenged Act is Unconstitutional.

New York Military Law 180-a:

(a) Makes a legislative determination that the state owns a specific leasehold;

(b) Does not compensate the true owners of the leasehold;

(c) Purports to overrule the New York Court of Appeals; and

(d) Singles out a single armory for the elimination of the right of association; and is deliberately designed to confer substantial benefits upon a single specific private corporation and exclude all others.

(a) The legislature may not determine the title to a piece of property by passing an act.

New York Military Law 180-a(2)(a) provides, "The state, acting through the division, is and shall be recognized as and declared to be the lawful successor to the interest o0f the lessee under the city lease."

There is no claim that the either the Regiment or the field grade officers of the Regiment ever surrendered their leasehold.

In addition, New York Military Law 180-a(2)(b) provides

> "All improvements, betterments, fixtures, equipment, ornaments, decorative elements, and similar items affixed or attached to the armory building (i. e. all items other than moveable personal property which is not affixed to the walls or other parts of the building) are hereby

> recognized and declared to be an integral part of the armory and property of the state, and any and all persons who have heretofore installed or paid for the installation of any of the foregoing items are deemed to have donated such items to the state as of the time of installation of such items in the armory."

No claim has been made that the alleged donors of the items have been given any kind of due process or compensation.

This is a clear violation of the separation of powers. It purports to settle a claim of title to a leasehold and certain fixtures by legislation. It is a legislative encroachment on the judiciary in violation of *Kilbourn v. Thompson*, 103 US 168, 198 (1880). The only distinction between this and a bill of pains and penalties is that instead of legislative deprivation for a past offense, it is a legislative deprivation for not being the kind of upscale tenant the legislature wants.

(b) The legislature provided no compensation and no due process.

For the reasons set forth in the Petition this was a taking not for a public purpose at all but for a single pre-selected private corporation.

Furthermore the act makes no attempt to compensate anyone at all or to provide any means of seeking compensation.

The legislature seems to have simply assumed that everything a militia unit owns is property of the state. This is legally, actually, and historically untrue.

The origins of the militia go back to the time of King Alfred. *United States v. Miller*, 302 U.S. 174, 179 (1939). Relations between the King and the militia were controversial in the Seventeenth and Eighteenth Century and this was more true in America than in England. No one has ever claimed that the Minutemen in 1775 were alter egos of King George III.

The Militia is guaranteed by the Second Amendment to the Constitution, and by federal laws in continuous existence from 1 Stat 271 (1792). It is also provided for in various sections of the New York Military Law that go back to Chapter 25 of the Laws of New York of 1786.

Today most property of National Guard units is provided by the federal and state governments, but this was not always the case and is not the case of the property of the Seventh Regiment taken by New York Military Law 180-a.

The existence of the New York militia is guaranteed by the Second Amendment, and is regulated by both federal and state law. The property at issue in this case was dedicated for the use of the Regiment by members of it. Legal title to the property is in the hands of the senior officers of the Regiment for the benefit of the Regiment. The Regiment is not just a branch of the state government, nor just a branch of the federal government. It is an heir of the militias that predated 1776 by centuries, and whose rights are guaranteed by the Second amendment.

It is clear that the property in question was not state property.

(c) The court of last resort in New York has determined that the armory belongs to the Regiment.

In *Tobin v. Laguardia*, 276 NY 34, 43 (1937) the New York Court of Appeals held that the armory is owned by thy Regiment itself. An attempt by the legislature to declare ownership to no longer be in the Regiment but in the state for the civilian use of its urban development corporation by leasing it to an expensive restaurant is simply an attempt by the legislature to reverse a holding of the courts.

It is only by defying the prior determination of the court can the legislature seize the armory and its fixtures without any compensation and without any due process.

(d) The legislation curtails the freedom of association and expression of a selected limited group of veterans for the benefit of a selected private corporation.

New York Military Law 183 subordinates the right of meeting in an armory only to military need. New York Military Law 180-a, however, subordinates these rights of association and expression to the needs of a civilian restaurant operator in the case of one armory only. The only purpose for this curtailment of constitutional rights is the legislature's desire to accommodate one corporation set up specifically to take over the Regiment's property.

As more fully explained in the Petition, this legislation is subject to strict scrutiny because it has a severe impact on the right to associate. *Buckley v.*

Valeo, 424 U.S. 1, 25; *Kusper v. Pontikes*, 414 U.S. 51, 58-59 (1973) A legislative determination that a favored restaurant is a more desirable tenant than the National Guard unit that has been there for over a century is simply not a sufficient reason to burden the rights of organizations to meet to such an extreme extent.

Also as more fully explained in the Petition, such discrimination both in the beneficiary of the discrimination and in limiting the veterans' organizations that lose rights of association to one neighborhood (as well as the veterans of the Regiment itself) violates the constitutional requirements of both *Kelo v. New London*, 545 U.S. 469 (2005) and *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978).

Conclusion

Certiorari should be granted so that the order of the court of appeals can be reversed and the case remanded for further remand by the court of appeals to the district court for further proceedings including trial.

May 24, 2010

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